Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DAVID J. RAGAN,

Petitioner,

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

BRUCE ROSE
Counsel of Record
1127 S. Mannheim
Westchester, Illinois 60154
(708) 345-9880

AND

CRISTOFER E. LORD
10 S. LaSalle Street
Suite 3500
Chicago, Illinois 60603
(312) 606-0035

Counsel for Petitioner

55 pp

QUESTIONS PRESENTED

1. Whether, under Rule 56, F.R.Civ.P. and this Court's decision in Celotex Corp. v. Catrett, a movant may carry the burden of a summary judgment motion simply by asserting generally that the non-movant lacks evidence of an element of his claim such as "actual malice" without specifying what acts the purported lack of evidence relates to and/or what portion of the record allegedly indicates that lack of evidence.

2. Whether, under New York Times v. Sullivan and its progeny, statements of a purely subjective belief in the truthfulness of a defamatory statement are sufficient as a matter of law to establish a lack of "actual malice" when the defamatory statements admittedly lack factual support and are contrary to facts of record showing that the speaker knew that the defamatory statements are false.

LIST OF PARTIES AND RULE 29.1 STATEMENT

There are no parties to this proceeding not revealed in the caption of this case.

Respondent ContiCommodity Services, Inc. is a wholly-owned subsidiary of Respondent Continental Grain Company, whose shares are not publicly traded.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner David J. Ragan respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 12, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 63 F.3d 438 (5th Cir. 1995) and is reprinted in the Appendix at App. 1A-16A.

JURISDICTION

On September 12, 1995, the United States Court of Appeals for the Fifth Circuit entered its order affirming the decision of the district court. (App. 1A) Petitioner timely filed a Petition for Rehearing on September 26, 1995. The Petition for Rehearing was denied on October 11, 1995. (App. 17A-18A). The mandate issued on October 19, 1995.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

From in or about August 1981 until May 24, 1984, Petitioner David J. Ragan ("Ragan") was employed by ContiCommodity Services, Inc. ("Conti") to trade government securities and futures contracts for customers at ContiArbitrage-Houston ("CAH"). CAH was one of Conti's branch offices. Conti was, and is, a wholly owned subsidiary of the Continental Grain Company ("Continental"). (App.1A, 3A).[1]

As part of the CAH operation, Conti routinely lent the CAH customers the funds needed for trading government securities. (App.3A-4A). Government securities have fixed maturity dates and values and, for Treasury Bills and Notes, fixed rates of coupon interest paid at regular intervals. As a result, the customer loans were always repaid, and profits were realized, from the locked-in coupon interest payments and/or increases in values as the securities matured. (R.6:4714-22; 4827; Dkt No.1483, ¶¶58, 298-99, 323; Dkt.#1420, ¶15).

A. The CAH Shutdown And Its Aftermath

On May 24, 1984, Continental ordered Conti to close out all of the government securities positions in the CAH customers' accounts within 24 hours. (App.4A-5A). Continental ordered the shutdown for its own business

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[1] References to the Appendix herein are cited as "App.__."

reasons unrelated to the CAH loan program or any CAH customer profits or losses. (R.7:4569-72; Dkt.#1483, ¶65; Dkt.#1420 ¶64; D. Ragan Dep. at 2886-87).[2]. Conti, in turn, ordered Ragan to close out the CAH customers' positions, telling him that if he did not close out the positions, then Conti-Chicago would close out the positions itself. (R.6:4624; D. Ragan Dep. at 2871-73).

Knowing that he could do a better job than anyone at Conti-Chicago at closing out the customer positions as profitably as possible in what had been a "down" market for several months, Ragan closed out the customer positions. Ragan protested the closing, reminding Conti that the closeout would cause the realization of massive losses in the customer accounts. He told Conti management that if the accounts were left open only a little longer, then they could be closed out profitably. Conti insisted that the positions be closed out. (D. Ragan Dep. at 2871-73, 3087).

The shutdown came without warning to any of the CAH customers. (See, D.Ragan Dep. at 2886-87). At that time, because of several months of adverse market

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[2] Certain of the pleadings filed in the Northern District of Illinois were not included in the record compiled by the Clerk of the Southern District of Texas. On motion of the parties, those pleadings were added as supplements to the record and are referred to by their docket numbers on the Northern District of Illinois's docket sheet.

The docket sheet is Item number 2 in Ragan's Record Excerpts provided to the Fifth Circuit and is hereinafter cited as "Rec. Ex." References to the Record on Appeal are cited as "R.___."

movements, Conti had $55 million in outstanding payments to government securities dealers on behalf of the CAH customers.[3] (App. 4A-5A). After the shutdown, Conti could not recoup those payments because the securities that were the intended source of repayment had been sold on Continental's orders on May 24, 1984.

Ragan resigned from Conti the following day, May 25, 1984 and immediately went to work for Merrill, Lynch. (R.7:4546-49; Dkt.#1483 ¶¶35, 284-85)

At the time of the May 24, 1984 shutdown, Conti and Continental had been under regulatory scrutiny both for their parts in the Hunt brother's late-1970s efforts to corner the silver market and for the closing of another of Conti's branch offices that had been doing commodities trading in cocoa and sugar. (Rec. Ex. 12). Additionally, despite the fact that it was Conti's and Continental's premature

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[3] This amount was not unusual. Nine months earlier, in August 1983, Conti had approximately $33 million in outstanding payments to the dealers. Over the next five months, Ragan and his traders realized approximately $15 million in profits, thereby reducing the outstanding dealer balances to approximately $18 million by the end of January, 1984. (R.6:4692-95). In February 1984, the market declined somewhat and the dealer payments increased again to $33 million. Prices flattened in April before dipping steeply in May 1984. (Id.). The market turned upward again within days of the shutdown and began a 2-year climb. The combination of maturing securities, interest payments and the improved market would have entirely eliminated the dealer payouts four months later,in October, 1984, and would have resulted in ever increasing profits for the CAH customers for at least the next two years. (R.2:5610, 5606, 5602).

closeout of the customer positions that had transformed the $55 million in temporary dealer payouts to final realized losses for the customers, Conti and Continental still wanted to recover as much of the money as possible for themselves. To accomplish this end, for the first time since the inception of CAH, they began sending out margin calls for negative balances in the government securities side of the trading. (Rec. Ex.13; R.6:4699; Dkt. #1421, ¶¶769-70).

Against this background, they were not only facing the probability of CAH customer lawsuits as a result of the CAH shutdown, but they also had a crisis in their final bookkeeping reconciliation of the CAH accounts following the shutdown. The CAH backoffice was in chaos after the shutdown with a large number of the closeout trades not yet put into their proper accounts. (R.6:4772-74; 4784-86; Dkt. #1483, ¶282; Dkt.#1421, ¶¶814-22, 826).

B. Conti And Continental's Efforts To Blame Ragan For The Losses

Immediately after the shutdown, Conti and Continental began pressuring Ragan to take personal blame for the losses. They also wanted Ragan to oversee the final bookkeeping process. They intended thereby to take advantage of the backoffice chaos to place the bulk of the losses in the accounts of "deep pocket" customers. Conti and Continental believed that those customers would be more likely to pay, at least something, if they were sued for the losses in their accounts. (Rec. Ex. 13; D. Ragan Dep. at 2865-71). Ragan refused. Id.

Conti and Continental began threatening Ragan with

the loss of his trading license and the ruin of his career unless he acted like a "team player" and did their bidding. Ragan still refused. (Id.).

C. Conti's And Continental's Reprisals Against Ragan

Although Ragan had resigned from Conti on May 25, 1984, on June 22, 1984, Conti falsely reported to the Chicago Board of Trade ("CBOT") that it had "terminated" Ragan on June 7, 1984. (Rec. Exc. 14 at 1.)

One week later, on June 29, 1984, Conti and Continental representatives and their accountants met with Merrill, Lynch executives at Continental's New York headquarters. According to the Merrill, Lynch representatives and at least one Conti representative who were present, during the June 29, 1984 meeting, the Conti and Continental representatives told Merrill, Lynch, *inter alia*, that: i) Ragan was dishonest in his CAH trading; ii) Ragan had caused the CAH losses by putting on a $1.5 billion unhedged, unarbitraged position in the Spring of 1984; iii) Ragan had put favorable trades into the accounts of himself and preferred customers such as his father; and iv) that, as a result of Ragan's unprofitable trading, Continental had been forced to inject $40 million in additional capital into CAH. The Merrill, Lynch executives testified that the entire tone of the meeting implied that Ragan had engaged in criminal conduct. (Dkt.#1483, ¶¶287-99).

Merrill, Lynch immediately fired Ragan. (Rec. Ex. 13). Conti immediately thereafter rehired him to oversee the final CAH bookkeeping reconciliation. (Dkt. # 1421,

¶¶875, 881). When it became clear by September 1984, that Ragan still would not be a "team player", however, Conti fired him.

Conti and Continental thereafter informed the CBOT that Ragan had concealed the CAH losses from Conti, explaining that was the reason that Conti had failed to meet its net capital requirements in violation of CBOT regulations. Conti and Continental also charged that Ragan had failed to follow orders during the final CAH bookkeeping reconciliation process. (Rec. Ex.14 at 2-3).

As a result, based on Conti's and Continental's statements, the CBOT concluded that Ragan had improperly handled the CAH accounts, had misled Conti about both the volume of his trading and the extent of the CAH losses, and had disobeyed instructions, thereby causing Conti severe financial losses. Ragan's license was summarily suspended. (Rec. Ex.14 at 2-3).

Contemporaneously with the CBOT action, Conti and Continental filed a pre-judgment attachment action in Kentucky where Ragan had a farm. (R.24:167-81). Ragan subsequently filed a Chapter 11 proceeding in the Bankruptcy Court in Lexington, Kentucky.

II. PROCEDURAL BACKGROUND

In November 1984, Conti and Continental sued Ragan. Ragan counterclaimed alleging, *inter alia*, defamation, tortious interference, and breach of contract. These cases were consolidated with others filed in the wake of the CAH shutdown as Multi-District Litigation No. 644 ("MDL 644"). The multidistrict litigation was assigned to

the Northern District of Illinois. (App. 1A, 3A, 5A-6A).

The district courts that handled this case had jurisdiction over Ragan's counterclaims under 28 U.S.C. §1332 due to the complete diversity of the parties. Ragan is, and was, a resident of the State of Texas while Continental and Conti are both corporations organized under the laws of the State of Delaware. Continental has, and had its principal place of business in New York, New York. Conti has, and had its principal place of business in Chicago, Illinois. The amounts in controversy substantially exceeded $50,000.

A. The 1989 Summary Judgment Proceedings In Illinois

In 1989, Conti and Continental moved for summary judgment on Ragan's claims. The Illinois district court granted their motion on most of Ragan's claims. The district court denied their motion as to Ragan's defamation claim. The district court also granted only partial summary judgment on Ragan's tortious interference claim. (App.5A, 8A).

The district court held that Ragan had shown that Conti and Continental had intended to induce his firing at Merrill Lynch and that they had induced his firing through the information that they had conveyed to Merrill, Lynch. The district court, however, also held that Ragan had not shown the loss of any other employment as a result of Conti's and Continental's actions. Therefore, the district court held that Ragan's damage claims would be limited to the loss of his Merrill, Lynch employment. (App.8A).

B. The 1993 Texas Summary Judgment Proceedings

In 1990, following ruling on the parties' summary judgment motions, the Illinois district court transferred the remaining claims of Ragan, Conti and Continental back to the Southern District of Texas -- where the cases had originally been filed -- for trial. (App.5A).

In February 1989, Ragan was indicted for wire and mail fraud based on five transactions that had been put into the Conti computers by one of the CAH backoffice personnel. In September 1992, a jury found him guilty on all counts. On June 14, 1994, the United States Court of Appeals for the Fifth Circuit reversed the conviction without remand, finding that there was "no" evidence linking Ragan to the indictment transactions. (App.7A, 9A); United States v. Ragan, 24 F.3d 657, 660 (5th Cir. 1994).

While Ragan's conviction was on appeal, Conti and Continental moved for summary judgment again. They incorrectly argued that Ragan's remaining claims were based only on his allegations that Conti and Continental had accused him of criminal misconduct (rather than on the specific statements set forth in §I.C., *supra*, and that, therefore, his criminal conviction proved that their statements to Merrill, Lynch were true. R.3:5308-29, 5333-5438; R.4:5123-5264A, 5267-5302).

In Conti's and Continental's 1990 summary judgment motion, their discussion of Ragan's criminal conviction consumes approximately six pages. In the middle of that discussion, the following paragraph appears:

> In addition, an employer such as Conti is entitled to qualified immunity in commenting in good faith on the character of a former employee such as David Ragan. [citations omitted]. The fact that Conti's alleged comments on Ragan's character have proven accurate demonstrates Conti's good faith.

(R.4:5255)

In their motion, Conti and Continental did not point to any comments that allegedly had been proven accurate.

In response, Ragan provided the Texas district court -- as he had previously done for the Illinois district court -- with the specific statements and the supporting evidence on which his claims for tortious interference and defamation were based; those set forth in §I.C., *supra*. He pointed out that: i) Conti's and Continental's wrongful statements went far beyond Conti's and Continental's suggestions of criminal misconduct in the Merrill, Lynch meeting; and ii) even those statements did not include any allegation that Conti and Continental had told Merrill, Lynch that he had engaged in the conduct charged in the indictment. (R.4:5297)

Consequently, Ragan explained, the criminal conviction could not, as a matter of law, act to collaterally estop him from proving the falsity of Conti's and Continental's wrongful statements on which his claims were actually based. Moreover, Ragan explained, even if collateral estoppel applied to his claims insofar as they were based on false allegations of criminal misconduct, then that should result in only partial summary judgment

because his claims were based on other false statements in addition to those concerning criminal misconduct. Ragan also urged the district court to delay its ruling until the conclusion of the criminal appeal because that conviction was fatally flawed and should be reversed. (R.4:5267-5302).

Ragan further responded to Conti's and Continental's reference to their purported "good faith" by explaining again that, because he had never claimed that Conti and Continental had ever falsely accused him of the conduct charged in the indictment, any discussions about "good faith" based on the criminal conviction were irrelevant. (R.4:5296, n.7).

On July 16, 1993, the Texas district court granted Conti's and Continental's summary judgment motion in a one paragraph Order stating in pertinent part only that, "David Ragan's criminal conviction eliminates any genuine issue of material fact regarding the issue of truth..." (App.7A-8A).

On April 14, 1994, the district court dismissed with prejudice all of Ragan's claims against Conti and Continental.[4] At Conti's and Continental's request, in its

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[4] Conti and Continental's claims against Ragan, however, remain pending -- but stayed -- in the district court. On appeal, Conti and Continental promised the Fifth Circuit that they would dismiss their claims if the Fifth Circuit affirmed summary judgment. Conti and Continental have told the district court that they want their claims to continue stayed because they need to retain those claims as "leverage" against Ragan in ongoing litigation between them pending in the

April 14, 1994 Order and pursuant to F.R.Civ.P. 54(b), the district court also expressly found that there was no just reason to delay entry of a final judgment dismissing appellants' claims or to delay appeal of that judgment. Final judgment was, therefore, entered on Ragan's claims on April 14, 1995 thereby making that judgment final and appealable. (App.7A-8A).

Ragan's Notice of Appeal was timely-filed on May 6, 1994. Five weeks later, on June 14, 1994, the Fifth Circuit reversed outright Ragan's criminal conviction with its "no" evidence determination. United States v. Ragan, 24 F.3d 657, 660 (5th Cir. 1994).

C. Conti And Continental Raise The Issue Of "Malice" On Appeal

In his opening Fifth Circuit brief, Ragan pointed out, *inter alia*, that the summary judgment on his claims should be reversed under Rule 60(b), F.R.Civ.P. because of the reversal of the criminal conviction. He also repeated his arguments made to the district court, *inter alia*, that his defamation and tortious interference claims had never included any allegation that Conti and Continental had ever falsely accused him of the conduct charged in the indictment. Hence, the doctrine of collateral estoppel (on which the district court apparently had rested its summary judgment) could not apply as a matter of law. (Ragan's Br. at 33-36).

In response, Conti and Continental conceded that

Illinois state courts.

the reversal of the criminal conviction meant that the summary judgment could no longer stand on its only express basis. They argued, however, that summary judgment still could be affirmed on an alternate ground that Ragan had failed to show by clear and convincing evidence that Conti and Continental had acted with malice when making their false statements on which Ragan's claims actually were based. They told the Fifth Circuit that they had raised the issue of malice in connection with those statements in their summary judgment motion in their one paragraph on "good faith" quoted above in §II.B., *supra*. They argued that Ragan had never responded with evidence contradicting their assertion that they had acted without malice when making the statements on which Ragan's claims were based. (Conti/Continental Br. at 34-39).

As support for their contention that they had not acted with malice, in their Fifth Circuit brief, they quoted for the first time from an affidavit given by a Conti executive, Robert Stain, who had attended the Merrill, Lynch meeting. They also referred for the first time to the excerpt of a deposition of the same witness included in an appendix to their Fifth Circuit brief. Neither the affidavit nor the deposition had ever been submitted to the Texas district court as part of Conti's and Continental's 1993 summary judgment motion. (Conti/Continental Br. at 38; Rec. Ex.1).

The affidavit had been submitted only to the Illinois district court in 1989. At that time, it was provided in opposition to the summary judgment motion of an unrelated party in the multidistrict litigation. (Conti/Continental Br. at 38; Rec. Ex.1).

The quote from the affidavit states:

"2. In the first week of May 1984, Herbert Evers, Conti's President, requested that I go to Conti's Houston Arbitrage branch office to supervise certain activities in that office. During the course of my discussion with Mr. Evers at this time, Mr. Evers stated that he had learned some things that had caused him to believe that David Ragan, the manager of the Houston Arbitrage branch, was being dishonest with us.

"3. It was my understanding at the time that Mr. Evers' comment concerning Mr. Ragan's honesty reflected Mr. Ever's concern with Mr. Ragan's inability or unwillingness to provide Mr. Evers with precise information relating to trading losses Mr. Ragan may have sustained. Mr. Evers did not suggest to me in early May 1984, nor did I then believe, that Mr. Ragan had engaged in conduct that had the effect of improperly benefitting himself or others at the expense of Conti or its customers. I did not begin to form the belief that Mr. Ragan had engaged in such improper conduct until late May 1984, based on information that became available to me during my stay in Houston." (DK No.1420, Ex. B., ¶¶2&3; DK No. 1543-4:¶287; Appellees' Record Excerpts, Ex.2, Stain Dep. at 871).)(sic)

The deposition excerpt in the Fifth Circuit Appendix only confirms that, during the June 29, 1984 meeting, Conti and Continental told Merrill, Lynch that they "felt" that Ragan was dishonest in his handling of the CAH trading, but it provides no facts on the nature or basis of

that "feeling."

Conti never identified, described or explained anywhere in its Fifth Circuit brief what information Mr. Evers allegedly learned, what alleged information Mr. Stain acquired in late May 1984 or, on what basis Conti and Continental "felt" that Ragan was "dishonest" by the time of the June 29, 1984 Merrill, Lynch meeting.

The deposition excerpt of another attender of the Merrill, Lynch meeting -- also included for the first time as an excerpt to Conti's and Continental's Fifth Circuit brief -- confirmed that Conti and Continental had no evidence of wrongful transactions allegedly engaged in by Ragan until October 1984; four months after the Merrill, Lynch meeting and the false statements. (Conti/Continental Br., Rec. Ex.3). Again, Conti and Continental never identified, explained or described anywhere in their Fifth Circuit brief what that "evidence" was.

Ragan replied that Conti and Continental were improperly raising the "malice" issue for the first time on appeal. He pointed out that Conti's and Continental's one paragraph on "good faith", both in context, and because of its reference to Conti's statements having been "proved correct", could only have referred to accusations concerning the conduct charged in the indictment because those were the only statements that Conti and Continental could have claimed had been proved correct and those accusations had never been part of Ragan's claims. (Ragan Reply Br. at 11-12).

Consequently, Ragan explained, contrary to the assertions in Conti's and Continental's brief, he had not

failed to respond in the district court to their "malice" issue, particularly concerning all of the statements on which he was actually basing his claims. Rather, he argued, Conti and Continental had never referred in any way to those statements in any of their summary judgment papers. Therefore, malice in connection with those statements on which his claims were actually based had never been raised in the district court. (Ragan Reply Br. at 11-12).

Notwithstanding those explanations, Ragan also directed the Fifth Circuit to the specific portions of the record where he had identified the statements on which his claims were based. (R.4:5297). He also directed the Fifth Circuit to the specific record evidence that showed that Conti and Continental knew that all of the defamatory statements were false at the time that they made them. (Ragan Reply Br. at 12-16).

This evidence included the fact that it was Conti-Chicago, not CAH or Ragan, that had daily balanced all of Conti's books for the CAH government securities trading and that had handled the daily disbursements to the dealers that eventually totalled up to $55 million at the time of the shutdown. Therefore, Conti and Continental knew the extent of the dealer payouts at all times and nothing about those payouts was, or could have been, concealed or misrepresented by Ragan. (R.6:4692-95; Ragan Br. at 13-19; Ragan Reply Br. at 14).

Ragan also directed the Fifth Circuit to the evidence that Conti-Chicago, not Ragan or CAH, had been fraudulently misreporting Conti's net capital for years. That was why Continental had to inject the $40 million in

additional capital into Conti in 1984; it was not because of anything that Ragan had done. That evidence also showed that, by the time discovery began in the multidistrict litigation, Conti and Continental had managed to "lose" or destroy all of the workpapers for Conti's two and a half years of net capital computations, presumably to conceal the fraud. (Ragan Br. at 22-23; Ragan Reply Br. at 13-14).

This and other evidence establishing that Conti and Continental knowingly made their wrongful statements was identified in the record and discussed by Ragan in his Reply Brief. (Ragan Reply Br. 11-15). Ragan also pointed out that the evidence that he identified was not only uncontested, but that Conti and Continental had not even referred to, or even discussed any of the evidence, much less tried to refute or contradict it. Id.

He also pointed out that Conti's and Continental's own summary judgment materials showed that, at the time of the Merrill, Lynch meeting, they admittedly had no evidence to support their wrongful statements and that they had none until four months after those statements were made. Although Conti and Continental had not identified that evidence, Ragan presumed that it had to do with the transactions that he had already identified to the district and the circuit courts. He noted that none of his evidence showing that the transactions were proper (and that Conti and Continental at all times knew they were proper) had been refuted, contradicted or even acknowledged by Conti and Continental. (Ragan Parties' Mtn. To Supp.)

On September 12, 1995, the United States Court of Appeals for the Fifth Circuit issued its Opinion in this case

affirming the district court's grant of summary judgment. (App.1A-16A). The Fifth Circuit held that the Texas district court had improperly granted summary judgment based on the now-reversed criminal conviction. The court noted that there is no legal basis for the proposition that any criminal conviction satisfies the "truth inquiry" for defamatory statements as Conti and Continental had persuaded the district court to rule. (App.8A-9A).

Instead of reversing the district court's summary judgment pursuant to Rule 60(b) as Ragan had requested, the Fifth Circuit accepted Conti's and Continental's suggestion that it affirm summary judgment on the grounds that Ragan had failed to show "malice" with regard to all of the wrongful statements that Conti and Continental had made on which Ragan's claims were actually based. (App.9A-14A). The Fifth Circuit never acknowledged or addressed the issue that Ragan had raised: Whether Conti and Continental had, in the district court, sufficiently raised the issue of "malice" with regard to all of the statements on which Ragan's claims are based, rather than raising the issue only in the narrow area of his criminal conviction. The Fifth Circuit simply stated that Conti's and Continental's summary judgment motion was "properly supported" and that they had carried their "initial burden to show the absence of evidence that [they] acted with malice." (App.11A, 12A).

In deciding that Ragan had failed to show malice sufficiently, the Fifth Circuit did not refer to any of the specific wrongful statements on which Ragan's claims rest. The Fifth Circuit also did not acknowledge any of the evidence that Ragan had identified in the record showing both, that Conti's and Continental's statements were false,

and that they were knowingly false when made. (App.9A-14A).

The only evidence the Fifth Circuit discussed was Conti's and Continental's acknowledgement that they had no evidence of any wrongdoing until four months after the Merrill, Lynch meeting. The Fifth Circuit did not mention that the later evidence was unidentified by Conti and Continental or that, what Ragan and the Fifth Circuit had to presume the evidence was, uncontestedly supported Ragan's favor. (App. 11A; Ragan Parties' Mtn. to Supp.).

Instead, the Fifth Circuit simply held that Conti's and Continental's claim that it developed (unidentified) evidence to support its wrongful statements four months after they were made, evenly balanced with the fact that they had no support for their statements when they were made. Therefore, the Fifth Circuit concluded, such evenly balanced evidence did not suffice to meet the "clear and convincing" standard applicable here. (App.11A). In so doing, the Fifth Circuit placed great reliance on its own case, decided just weeks before oral argument here, Duffy v. Leading Edge Products, Inc., 44 F.3d 308 (5th Cir. 1995). In Duffy, the Fifth Circuit decided a similar malice issue by a close examination of what the defendant "believed" at the time of their wrongful statements.

Based on: i) the Fifth Circuit's reliance on Duffy's emphasis on a defendant's subjective belief as to the truthfulness of the wrongful statements: ii) the Fifth Circuit's disregard of the evidence in the record showing Conti's and Continental's actual knowledge of the falsity of their statements: and iii) the fact that the only evidence Conti and Continental relied on for their motion was

belated references to their subjective beliefs without any explanation as to the factual bases for those beliefs, it appears that the Fifth Circuit granted summary judgment because Ragan did not refute the Conti's and Continental's statements as to their subjective beliefs. Implicit in that finding, given the evidence of record, is that objective evidence that the defendant knew the true facts at the time of the statements is irrelevant to the malice issue. Unless the plaintiff can produce some admission by the defendant that he entertained serious doubts as to the truthfulness of the statements -- even if that belief was directly contrary to his subjective belief -- then that belief is sufficient to defeat summary judgment.

A timely-filed Petition for Rehearing was denied by the Fifth Circuit on October 11, 1995. (App.17A-18A). This Petition seeks review of the Fifth Circuit's September 12, 1995 Opinion.

REASONS FOR GRANTING THE PETITION

The questions of what a summary judgment movant must do to sufficiently identify, what he claims are, uncontested issues of fact defeating one or more elements of the non-movant's case and what, if any record evidence he must identify to show that those issues are uncontested, present substantial questions of federal civil procedure. If, as happened here, a movant may simply stand up and say the nonmovant has no case and is not required to explain what particular aspect of the case is under fire or even to direct the district court and non-movant to the record evidence allegedly indicating that the non-movant lacks sufficient evidentiary support for his case, then both the courts and the litigants will be put to enormous

burdens.

When responding to such a non-focused motion, non-movants will be forced to "load up the boat" with all of the evidence that they can think of, with the hope that they have covered everything that the movant may later say was the subject of the motion. That will be particularly true where, as here, at least one of the issues may be intent or knowledge. Often, determinations of such subjective elements can only be made by examining the complete record. Consequently, if the Fifth Circuit's view prevails, the courts will have the task of performing complete paper trials, reviewing entire records through affidavits, documents, and depositions; evidence that could be better and more efficiently presented through live testimony and trial exhibits.

Similarly, if defendants in defamation cases may defeat summary judgment simply by asserting that they "believed" that what they said was true without having to explain the basis for that belief and regardless of all empirical evidence showing that they, in fact, knew the true facts, but spoke falsely anyway, then the law of defamation -- as well as any prudent First Amendment restrictions on speech -- are gone.

If this published decision begins to followed within the Fifth Circuit or is picked up by other Circuits, then these issues will have significance far beyond this case. Indeed, it appears that this case and the Fifth Circuit's recent decision in Duffy v. Leading Edge Products, Inc., 44 F.3d 308 (5th Cir. 1995), both of which focused on the subjective belief of the defamation defendant, are beginning in a trend in that direction.

The extreme nature of the facts of this case make it the appropriate vehicle in which to address these issues.

A. The Fifth Circuit's Ruling Eliminates This Court's Requirement In Celotex v. Catrett And Rule 56 F.R.Civ.P. That Summary Judgment Movants Must Carry An Initial Burden Of Informing The District Court Of The Basis For Their Motions And Identifying Those Portions Of The Record That Support Their Motions.

In Celotex v. Catrett, 477 U.S. 317, 323 (1986), this Court re-affirmed that a summary judgment movant under Rule 56, F.R.Civ.P. "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions [of the record] which it believes demonstrate the absence of a genuine issue of material fact." Of course, the Court also held that a summary judgment movant may satisfy that burden by pointing out to the district court that there is an absence of evidence to support the nonmovant's case. 477 U.S. 325. Taken together, however, these portions of Celotex appear to hold that even when a movant proceeds by pointing out the alleged absence of evidence in the non-movant's case, the movant must still identify the specific subject of the motion and what any record evidence on that subject does show.

This is not to say that the movant must come forward with affirmative evidence; Celotex clearly holds otherwise. Nevertheless, it appears clear that the movant must still provide at least direction to the nonmovant and the district court in order to carry his initial burden.

This conclusion also follows from the citation in Celotex to the Court's earlier decision in Adickes v. S.H.Kress, 398 U.S. 144 (1970). In Celotex, the Court repeated the teaching of Adickes that the 1963 amendment to Rule 56(e), F.R.Civ.P. was not intended to reduce a movant's initial burden of showing the absence of any material fact. 477 U.S. 325. The Celotex Court also agreed that the summary judgment was properly denied in Adickes. Id.

In Adickes, summary judgment was denied because the movant had failed to negate a possible factual scenario under which the non-movant plaintiff could have prevailed. The Adickes Court that summary judgment was improper even though the movant argued that it should efectively win by default because the non-movant had failed to provide any direct evidence of her own on the issue in an affidavit or otherwise.

It was in that context that this Court held that the movant still retains the burden of first showing the absence of any material fact even if the nonmovant presents no opposing evidence at all. Even in that situation, the movant is still not entitled to summary judgment, the Court held, unless evidence identified in the motion sufficiently establishes that there is no question of material fact on the issue. 398 U.S. 156-60.

In their moving papers in the district court, Conti and Continental made only a general statement that they acted in "good faith." They did not point to any particular acts they had performed or statements they had made allegedly in "good faith." They provided no factual basis, and they pointed to no factual basis in the record, that

would establish their "good faith." In context, it appeared that they were referring only to irrelevant accusations they had made that Ragan had engaged in the conduct charged in the indictment; accusations which had never been part of Ragan's claims against Conti and Continental.

Even in the Fifth Circuit when Conti and Continental asserted for the first time that their reference to "good faith" was intended to encompass every wrongful act on which Ragan's claims were based, they neither identified the wrongful statements or acts, nor identified any evidence indicating a lack of actual malice in connection with those statements and acts. Their only "evidence" -- offered for the first time on appeal -- was an affidavit stating that in the Spring of 1984, various Conti executives "felt" or "believed" that Ragan was being dishonest.

Conti and Continental provide no explanation or support for this belief except a statement that four months later, Conti and Continental were given auditors' reports showing suspect transactions. Conti and Continental do not even identify these reports or explain what information they contained.

In response, Ragan countered with specific references to record evidence and explanations establishing through uncontested evidence that at all times Conti and Continental actually knew the true facts behind their statements.

Nevertheless, the Fifth Circuit still found that Conti's and Continental's motion was "well supported" and that they had "carried their burden." This conclusion is

clearly a rejection of Celotex and Adickes. Granted, one of the teachings of Celotex was that summary judgment was not to be disfavored and that district courts should no longer be reluctant to grant summary judgment where warranted. The Fifth Circuit, however, has taken Celotex to its most extreme; requiring nothing more of a movant that a bald assertion that the non-movant has no case. This Court should reverse such a radical interpretation of Celotex.

B. The Fifth Circuit Has Reduced New York Times v. Sullivan And Its Progeny To Nullities Through Its Complete Reliance On The Defendant's Self-Serving Statements Of "Good Faith."

This case was decided under the Texas law of defamation and malice. (App. 6A). Texas has adopted the standards set forth in this Court's decisions in New York Times v. Sullivan, 376 U.S. 686 (1964) and St. Amant v. Thompson, 390 U.S. 727 (1968) as Texas's law on defamation and actual malice. See, e.g., Casso v. Brand, 776 S.W.2d 551, 554, 558 (Tex. 1989)(expressly adopting the New York Times and St. Amant standards); Freedom Communications, Inc. v. Brand, 907 S.W.2d 614, 619-20 (Tex. App.--Corpus Christi 1995)(citing both New York Times and St. Amant and intervening Texas cases for the same standards). Consequently, the Fifth Circuit's decision in this case acts as a joint interpretation of both Texas and federal law as established in this Court's decisions.

Both the federal and the Texas cases have repeatedly relied on the St. Amant formula that to establish reckless disregard, one must provide sufficient evidence to permit

the conclusion that the defendant, in fact, entertained serious doubts as to the truth of the publication. 390 U.S. 731. The St. Amant decision, however, expressly rejects the idea that merely testifying that one acted in good faith will insure an automatic favorable verdict. The finder of fact, wrote the St. Amant court, must weigh the movant's protestations of good faith against empirical facts such as whether the statement is fabricated or based on unreliable or unverified statements of others. 390 U.S. at 731-33.

This weighing of subjective statements of good faith against objective facts showing possible knowledge or reckless disregard for the truth has carried down through the Court's most recent Opinions in this area. See, e.g., Masson v. New Yorker Magazine, 501 U.S. 496, 520-21 (1991)(summarizing factual issues and inconsistencies that could indicate reckless disregard).

Although Texas muddies the waters slightly, sometimes making it appear that the "serious doubts" element applies to knowingly false statements as well as to those spoken with reckless disregard for the truth, See, e.g., Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771, 771-72 (Tex. 1994)(on which the Fifth Circuit placed great reliance), the Texas courts have not made the actual malice determination one based solely on the self-serving subjective statements of the defendant's alleged good faith. Rather, the Texas courts, including the seminal case relied on by both the Hagler court and the Fifth Circuit, Casso, continue to require the non-movant to provide other empirical evidence that would cast doubt and raise questions of fact concerning the defendant's own statements of purported good faith.

Indeed, the Casso court expressly rejected a "barebones" affidavit offering only unsupported allegations of "good faith", as was provided here, as being insufficient to entitle the movant to summary judgment even in the absence of contravening evidence from the non-movant. Such an affidavit does not prove that the defamatory statements were not made with knowledge that they were false or with reckless disregard for their falsity, the Casso court wrote. 776 S.W.2d at 559.

Hence, both Texas's and this Court's opinions have soundly rejected the idea that an affidavit or deposition testimony containing only unsubstantiated claims to "good faith" is sufficient to entitle a movant to summary judgment on the issue of "actual malice." Nevertheless, that is precisely the Fifth Circuit's holding in this case.

Conti and Continental provided the type of "barebones" affidavit expressly rejected in Casso. They claimed that they found supporting evidence four months after the statements, but they never identified that evidence and the Fifth Circuit never explained how purported evidence, never identified, and allegedly acquired months after defamatory statements were made, could possibly entitle a movant to summary judgment on whether the movant's earlier statements had been made with malice.

In opposition to this evidence, Ragan identified specific evidence in the record showing actual knowledge on the parts of Conti and Continental. The Fifth Circuit did not even mention this evidence, evidently finding Conti's unsupported claims of "good faith" to be sufficient. This is contrary to Texas and federal law and it appears to be a further step down the path of making malice

determinations entirely subjective as the Fifth Circuit began to do in the Duffy case. This Court should halt this trend before it proceeds further.

CONCLUSION

For the foregoing reasons, Petitioner David J. Ragan respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

BRUCE ROSE
Counsel of Record

1127 S. Mannheim Road
Suite 314
Westchester, Illinois 60154
(708)345-9880

Counsel for Petitioner

CONTICOMMODITY SERVICES, INC. and Continental Grain Company, Plaintiffs-Counter-Defendants-Appellees,

V.

David J. RAGAN, et al., Defendants,

David J. Ragan and Joe O. Ragan,
Defendants-Counter-Plaintiffs
- Appellants. -

No. 94-20362.

United States Court of Appeals,
Fifth Circuit.

Sept. 12, 1995

As part of multidistrict litigation, employer, a commodity trading firm, brought action against former employee and customer for damages arising from trading activity attendant to closing of employer's branch office. Employee filed counterclaim alleging breach of contract, defamation, and tortious interference with business relationship. Customer filed counterclaim alleging breach of contract. The United States District Court for the Northern District of Illinois, William T. Hart, J., 733 F.Supp. 1555, granted in part employer's motion for summary judgment and transferred the remaining claims to Texas. The United States District Court for the Southern District of Texas, Norman J. Black, Chief Judge, granted employer's motion for summary judgment on the remaining claims and employee and customer appealed. The Court of Appeals, Stewart, Circuit Judge, held that: (1) employee's criminal conviction did not

satisfy truth inquiry as to his claims against employer for defamation or tortious interference by way of defamatory statements; (2) employee failed to establish "actual malice" necessary to overcome employer's qualified immunity defense to defamation claim; (3) employee failed to establish "malicious and intentional action" necessary for his tortious interference with business relationship claim; and (4) customer's claim, arising out of firm's orders to close out trading "positions" in his account, was one for conversion, rather than for loss of value, at maturity, of securities and commodities in his account.

Affirmed.

Bruce Rose, Rose, Magnuson & James, Westchester, IL, for appellants.

David T. Pritikin, Constantine L. Trela, Jo Lynn Haley, Sidley & Austin, Chicago, IL, Lawrence G. Weppler, Continental Grain, New York City, William G. Rosch, III, Rosch & Ross, Houston, TX, for ContiCommodity.

Appeal from the United States- District Court for the Southern District of Texas.

Before POLITZ, EMILI0 M. GARZA and STEWART, Circuit Judges.

STEWART, Circuit Judge:

As part of multidistrict litigation, ContiCommodity Services, Inc. and Continental Grain Company (together referred to herein as "Conti")[1] filed suit against David J. Ragan and Joe O. Ragan for damages arising from financial market trading activity attendant to the closing of Conti's Houston branch office. *ContiCommodity Services, Inc. v. Ragan*, No. H-84-4652 (S.D.Tex.); *In re ContiCommodity Services, Inc., Securities Litigation*, 733 F.Supp. 1555 (N.D.Ill. 1990). The Ragans filed a counterclaim against Conti, asserting *inter alia* that these damages arose because Conti had breached its contract to finance their debit balances and had made defamatory statements about David Ragan. The district court granted in part Conti's motion for summary judgment against the Ragans, and the Ragans appeal. We affirm.

FACTS

In 1981, Conti hired David Ragan to work in its Houston, Texas branch office. He conducted arbitrage trading, ranging from less speculative hedged positions to more speculative cash trading, for his customers and for his own account.[2] Conti routinely loaned money to

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[1] ContiCommodity Services, Inc., was a fully owned subsidiary of Continental Grain Company.

[2] "Arbitrage trading is the simultaneous purchase and sale of the same or equivalent securities or commodities in different markets or on different exchanges at different prices, in order to profit from the price differences between markets." *In re ContiCommodity Services, Inc.*,

Ragan's customers to finance trading activity, so that the customers had to deposit only a percentage of the transaction amount. The value of the customer's securities or commodities "position" could be expressed simultaneously in several ways which include (1) the net[3] face value of the position; (2) as the net market value of the position; (3) as the net face or market value of the position, minus the amount financed and associated fees or interest cost. By early 1984, the Houston branch office had sustained losses and Conti decided to close it.[4]

Securities Litigation, 733 F.Supp, at 1562.

[3] The securities or commodities could be (1) purchased in anticipation of an increase in market value and later sold; (2) sold -- or borrowed from elsewhere and sold (i.e., "sold short") -- in anticipation of a decrease in market value and later purchased for return to the presale owner of the security. These various options could be done at the same time in different markets, or at different times but with the same security or commodity, as noted above in footnote 2. "Net" value, as used in this sentence, refers to the net value of the purchases and the short sales. In addition, the cash securities could be purchased and held until maturity, at which time the face value and interest due on the security could be used to repay any amount that was financed.

[4] By the time it closed on May 24, 1984, Conti's Houston branch office had incurred more than $55 million in trading losses for the accounts of its arbitrage and speculative customers. The closing of the Houston office spawned numerous

The instant facts arise from Conti's decision to close out the customers' accounts in conjunction with the closing of its Houston office.

Conti filed suit against David Ragan, alleging fraudulent and fictitious transactions. The Ragans filed a counterclaim against Conti. In this counterclaim, David Ragan alleged that Conti breached its contract with him, tortiously interfered with David Ragan's employment contract, reputation, and prospective customer relationships by making defamatory statements, and fraudulently concealed its decision to close the Houston office. Joe Ragan alleged that Conti breached its contractual and fiduciary obligations by closing out his positions and thereby keeping him from reducing or offsetting his losses.

Many of the claims of the numerous parties to this case and related cases in this multidistrict litigation were disposed of in Illinois before United States District Judge Hart and are documented in a written opinion. *See In re ContiCommodity Services, Inc., Securities Litigation.* Among Judge Hart's rulings were summary judgments entered on several of the Ragans' claims against Conti. Judge Hart transferred the remaining claims between Conti and the Ragans to the United States District Court for the Southern District of Texas where United States District Judge Black rendered a final summary judgment against the Ragans on their remaining claims. The Ragans appeal this final summary judgment, as well as

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lawsuits in which approximately two million documents were filed.

some of the judgments entered by Judge Hart. The parties agree that Texas law is applicable to these state law claims.

DISCUSSION

The Ragans argue that the Texas district court erred in entering summary judgment because the evidence was sufficient to defeat the motion for summary judgment and because it reached issues that either were not appealed or had been decided by Judge Hart.

We review the district court's grant of summary judgment *de novo*. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), cert. denied, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992). Summary judgment is appropriate when the moving party shows that there is no genuine issue of material fact. *Id.* The moving party may make this showing by pointing out the lack of evidence to support the nonmoving party's case. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992), cert. denied, -- U.S. -- , 113 S.Ct. 98, 121 L.Ed.2d 59 (1992). Once this showing is made, summary judgment is proper against the nonmoving party when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Duffy*, 44 F.3d at 313-14. In order to defeat a properly supported motion for summary judgment, the nonmoving party must direct the

court's attention to admissible evidence in the record which demonstrates that it can satisfy a "fairminded jury" that it is entitled to a verdict in its favor. *International Shortstop, Inc.*, 939 F.2d at 1263; *Howell*, 897 F.2d at 192. At this point, the mere allegations in the complaint are not sufficient; the non-movant is required to identify specific evidence in the record, and to articulate the "precise manner" in which that evidence supported their claim. *Id.*; *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994), cert. denied, -- U.S.-- , 115 S.Ct. 195, 130 L.Ed.2d 127 (1994).

We shall address the summary judgment entered as to David Ragan and Joe Ragan, respectively.

A. Summary Judgment Against David Ragan[5]

Criminal charges were instituted against David Ragan for fraudulent and fictitious trade transactions in the form of eighteen counts of mail and wire fraud. A jury found him guilty on all eighteen counts. On July 16, 1993, while Ragan's conviction was on appeal to this court, Judge Black granted summary judgment in favor of Conti and against David Ragan because "David Ragan's criminal conviction eliminates any genuine issue of material fact regarding the issue of truth .... "[6]

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[5] References in this subsection to "Ragan" refer to David Ragan.

[6] Judge Black's "Final Judgment", filed April 14, 1994, referred to this July 16, 1993 order as

Before transfer of this case to Texas, Judge Hart had dismissed Ragan's tortious interference with employment claims "to the extent claims are made based on any employment relationship other than the one with Merrill Lynch", and had dismissed Ragan's claims of tortious interference with customer and business relations because Ragan presented "no nonhearsay testimony showing that counterdefendants provided any false information to the customers." *In re ContiCommodity Services, Inc., Securities Litigation*, 733 F.Supp. at 1581. Judge Hart's reasoning was as follows:

> There is evidence from which it can be inferred that counterdefendants intended to induce David Ragan's firing. David Ragan has also presented evidence to support the claim that the information provided by counterdefendants caused David Ragan's dismissal from Merrill Lynch. David Ragan, however, has not presented specific facts showing counterdefendants caused the loss of any other employment.

In the "Final Judgment" at bar, Judge Black granted summary judgment against Ragan on all remaining claims. The basis expressed for this judgment was that (1) Ragan's criminal conviction settled the question of the truth of Conti's allegedly tortious and defamatory statements in Conti's favor; (2) therefore, there is no

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the basis for final judgment against David Ragan. Ragan challenges as error the use of his conviction as the basis for summary judgment against him.

longer a genuine issue of material fact about the truth of these statements; and (3) therefore summary judgment is proper. There being no statutory or jurisprudential basis for the proposition that a criminal conviction satisfies the truth inquiry in a civil proceeding for defamation or tortious interference by way of these statements, neither party argues on appeal that Judge Black entered summary judgment against David Ragan for the correct reasons.[7]

The district court's grant of summary judgment against David Ragan, on the basis of his conviction which was on appeal at the time of judgment, was improper. Nevertheless, summary judgment may be affirmed on grounds other than the basis of the district court's decision. *See Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 193 (5th Cir. 1990); *see also, Matter of Lewisville Properties, Inc.*, 849 F.2d 946, 950 (5th Cir. 1988) and cases cited therein. We shall therefore address *de novo* whether the judgment was proper despite its improper basis.

Accusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege. *Schauer v. Memorial Care Systems*, 856 S.W.2d 437, 449 (Tex. App. Houston [1st Dist.] 1993) (citations omitted). This privilege protects such

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[7] The conviction was reversed on appeal to this court because the record did not show a sufficient connection between David Ragan and the charged offenses. *United States v. Ragan*, 24 F.3d 657, 660 (5th Cir 1994).

communications in the absence of actual malice.

In the defamation context, actual malice does not include ill will, spite or evil motive. *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771 (Tex.1994). "Actual malice" is a term of art which is defined as "the making of a statement with knowledge that it is false, or with reckless disregard[8] of whether it is true." *See Duffy*, 44 F.3d at 313, *quoting Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989). A finding of such malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Hagler*, *quoting Casso v. Brand*, 776 S.W.2d 551, 558 (Tex.1989); *Duffy*, *Id.* Where the employee claims that the employer made such references and accusations about him to one with a common interest (such as the employee's new employer), and the employer has pled the affirmative defense of qualified privilege, Texas law places on the plaintiff the burden of proof at trial with respect to malice. *Duffy*, 44 F.3d at 313-14, *citing Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970). Thus, in the instant case, it matters not whether such statements were true or whether the statements were made to Merrill Lynch and the Chicago

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[8] "Reckless disregard" is defined as a high degree of awareness of probable falsity which the plaintiff shows by presenting "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *See Duffy*, 44 F.3d at 313, *quoting Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989).

Board of Trade: if there is no clear evidence of "actual malice", then summary judgment was proper on these claims. *See and compare, Duffy v. Leading Edge Products, Inc.*, 44 F.3d at 313-316.

The plaintiff employee must show that the defendant employer acted with malice in order to overcome the affirmative defense of qualified privilege. In its answer to Ragan's counterclaim, Conti pled the defense of qualified privilege. The strongest evidence of malice is that Conti made these statements prior to having any concrete or objective indication of any wrongdoing on Ragan's part. Ragan argues that Conti's admission that it had nothing to support the allegedly defamatory statements until after it made the statements means that Conti had actual malice. Conti argues that the information which was later found by outside auditors confirmed the suspicions which it had communicated in the challenged statements. Neither of these arguments is more probable than the other and, without weighing the evidence, we find that Ragan has not made a showing that is sufficient to constitute the "clear evidence" of malice required to defeat a properly supported motion for summary judgment. Thus, in the absence of such a showing, Conti was entitled to summary judgment against Ragan even if the statements at issue were false.

Ragan also argues that Judge Black erred in dismissing *all* of his claims because he did not appeal Judge Hart's decision to deny Conti's summary judgment motion as to the Merrill Lynch portion of his tortious interference claims or as to his defamation claims. Our review of Judge Black's grant of summary judgment is *de novo*. Judge Black did not articulate any basis for

summary judgment other than Ragan's criminal conviction, and thus did not address Judge Hart's prior decision. The record before us shows that, as a matter of law, there is no genuine issue of material fact regarding Conti's qualified privilege defense. For this reason, we affirm the entry of summary judgment and do not address these arguments.

Ragan also argues that the loss of his trading license in conjunction with Conti's alleged wrongful conduct effectively ended his career in securities and commodities. He challenges Judge Hart's disposition of that claim as well as his claim of tortious interference with his non-Merrill Lynch employment and customer relationships. He asserts that he has shown a reasonable likelihood that, if he had not lost his trading license due to Conti's accusations, he would enter into "business relations" with prospective clients or employers and that, therefore, Judge Hart's dismissal of his claim of interference with business relationships should be reversed. We disagree. As we state in *In re Burzynski*, 989 F.2d 733, 739 (5th Cir. 1993),

> The requisite elements [for an action for tortious interference with prospective business relations] are: 1) a reasonable probability that the plaintiff would have gotten a contract, 2) malicious and intentional action by the defendant which aborted the prospective business relationship, and 3) actual harm to the plaintiff.

Conti has carried its initial burden to show the absence of evidence that it acted with malice. Thus, absent a showing by Ragan that Conti acted in a malicious and

intentional manner, there is no genuine issue of material fact on this element of Ragan's claims of tortious interference. We have already determined that Ragan has failed to show malice as the term of art is used in the context of alleged defamatory statements made by an employer and thus has failed to make a showing sufficient to establish an element which is both essential to his case and on which he would bear the burden of proof at trial. Here, the malicious and intentional actions alleged by Ragan are the alleged damaging statements made by his employer. For this reason, we also conclude that Ragan has not shown a genuine issue of fact as to the "malicious and intentional action" element in his tortious interference claims. Moreover, the record discloses potentially damaging statements made by Conti, but Ragan does not identify evidence that the statements were made to one who does *not* have a common interest.[9] Therefore, Ragan must show malice in order to overcome Conti's qualified privilege defense.

There being no genuine issue of material fact as to a critical element of David Ragan's claim of tortious interference, defamation, slander, & libel, summary judgment against him was proper.

David Ragan also challenges Judge Hart's entry of summary judgment against him on his claims of breach of contract. Conti correctly points out that the arguments

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[9] Both Merrill Lynch and the Chicago Board of Trade had an interest similar to that of Conti's interest as Ragan's employer. *See and compare*, *Duffy* and *Dun & Bradstreet, Inc.*

Ragan asserts on appeal were not presented in the response to Conti's summary judgment motion that was before Judge Hart. For this reason, we will not revisit Judge Hart's decision on this issue.

B. Summary Judgment Against Joe Ragan[10]

Joe Ragan challenges Judge Black's dismissal of his claims for damages allegedly sustained by Conti's orders to close out the positions in his account. By the time that Judge Black granted final summary judgment against Ragan; the only question remaining was whether there was a positive balance in Ragan's account at the time it was closed. Ragan had provided no indication that particular trades were challenged. *See In re ContiCommodity Services, Inc., Securities Litigation*, 733 F.Supp. at 1569-70. Accordingly, Judge Hart had determined that, unlike the conversion claim of other Conti customers which were based upon improper trades, Joe Ragan's conversion claim was that Conti converted the balances in his account and not that Conti improperly closed out their positions. *In re ContiCommodity Services, Inc., Securities Litigation, Id.*

Ragan now contends that his claim is one for damages due to loss of the *value* (at maturity) of the securities in his account and is not a claim for conversion. Ragan asks this court to accept as accurate

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[10] References in this subsection to "Ragan" refer to Joe Ragan. Joe Ragan did not challenge the summary. judgment entered by Judge Hart.

for purposes of damages calculation the value that the securities would have at maturity, rather than the market value of the securities at or near the time they were sold by Conti.[11] He contends that it is Conti's seizure of the securities that gave rise to his damage claim, without regard to what Conti did with them after it took them from his account; on this basis, Ragan argues that his claim is not one of conversion. This argument is not persuasive.

A review of Ragan's counter-claim and the arguments in support thereof which were made before Judge Hart show that Judge Hart's "conversion" characterization was accurate. The record shows no indication that Ragan tried to reinvest in the market or challenged the actions of Conti in closing out his account. Ragan argues that because Conti stopped financing his trades, Conti prevented him from reentering the market -- yet he does not point to any summary judgment evidence that he demanded either reinstatement of his positions or some other action to remedy the situation. A failure to either reinvest or demand reinstatement of one's trading

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[11] Ragan presented some evidence that his position in these securities finally, would have become "positive" some four months after the allegedly improper acts of Conti. However, he cites and we have found no statutory or jurisprudential basis for a finding that, as a matter of law, four months is a "reasonable" time to form the basis for calculating his requested "but for Conti's liquidation" damages in the type of trading that was done in his account.

position amounts to a decision to get out of the market and not risk a further loss. *See and compare*, *Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1067-68 (5th Cir. 1979). We find no statutory or jurisprudential basis to support Ragan's insistence that the value of Ragan's account is the face value of the securities in the account. Moreover, Ragan has not shown that he is entitled to relief based on this method or other methods of valuation. We affirm the district court judgment as to Joe Ragan.

CONCLUSION

As discussed. above, appellants have not shown that there exists a genuine issue of material fact in this case. Accordingly, we AFFIRM Judge Black's judgment which dismissed the remaining claims of David Ragan and Joe Ragan against ContiCommodity Services, Inc. and Continental Grain Company.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20362

U.S. COURT
OF APPEALS
FILED
OCT. 11, 1995
Charles R.
Fulbrugge III, Clerk

CONTICOMMODITY SERVICES, INC., and CONTINENTAL GRAIN COMPANY,

Plaintiffs-Counter-
Defendants-Appellees,

versus

DAVID J. RAGAN, ET AL.,

Defendants,

DAVID J. RAGAN
and JOE O. RAGAN,

Defendants-Counter-
Plaintiffs-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(October 11, 1995)

Before POLITZ, Chief Judge, EMILIO M. GARZA, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/S/ CARL E. STEWART

United States Circuit Judge

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FOR STAY OF THE
MANDATE

(2)

No. 95-1151

Supreme Court, U.S.
FILED
FEB 20 1996
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID J. RAGAN,

Petitioner,

v.

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

DAVID T. PRITIKIN
CONSTANTINE L. TRELA, JR.*
JAMES B. SPETA
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

* Counsel of Record

February 20, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

80 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in its application of the well-settled standards governing summary judgment practice to the facts of this defamation case, where the court of appeals determined that the moving parties had adequately identified qualified privilege as an uncontested issue on which petitioner bore the burden of proof and that petitioner had failed to identify any evidence sufficient to overcome that privilege.

2. Whether, on the facts of this case, the court of appeals erred in its application of the Texas state-law doctrine of qualified privilege to petitioner's defamation claims, where the court recognized a qualified privilege for past and present employers to discuss an employee and held that petitioner had failed to identify any evidence sufficient to overcome that privilege.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, Joe O. Ragan was a party to the proceedings in the Fifth Circuit. Joe O. Ragan has filed a separate petition for certiorari with this Court, No. 95-1147.

Pursuant to S. Ct. R. 29.6, respondents state that Continental Grain Company has no parent company. Continental Grain Company has one non-wholly owned subsidiary, ContiFinancial Corporation, which is a consolidated subsidiary the stock of which is publicly traded. The parent company of ContiCommodity Services, Inc., is Continental Grain Company; ContiCommodity Services, Inc., has no non-wholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1151

DAVID J. RAGAN,

Petitioner,

v.

CONTICOMMODITY SERVICES, INC. and CONTINENTAL GRAIN COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

ContiCommodity Services, Inc. ("Conti") and Continental Grain Company ("Continental") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner David J. Ragan.[1] Because the petition raises no important issue of federal law, it should be denied. First, petitioner's initial assertion that the Fifth Circuit misinterpreted or contradicted the well-settled law governing summary judgment procedure is

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[1] Joe O. Ragan, the father of David Ragan and also a party below, has filed a separate petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in this case; that petition has been assigned No. 95-1147.

demonstrably incorrect. The court of appeals correctly stated the law, and, in reality, the petition presents nothing more than a claim that the Fifth Circuit misapplied that law to the facts of the case before it. That question does not warrant a grant of certiorari. Moreover, the claim is baseless; the Fifth Circuit correctly applied Rule 56 to this case in all respects.

Second, petitioner's additional assertion that the decision below is in tension with *New York Times v. Sullivan*, 376 U.S. 254 (1964), is similarly unfounded. This case involves no issues arising under the first amendment, but rather rests entirely upon principles of state tort law. The court of appeals held (and petitioner does not challenge) that the state-law qualified privilege for communications between parties with a common interest in a subject matter—such as two employers discussing an employee (as was the case here)—applied to the allegedly defamatory statements in this case. The court also held that petitioner, who bore the burden of overcoming the privilege, had presented no evidence to satisfy that burden. Summary judgment was therefore appropriate. Although the Texas law of qualified privilege includes an "actual malice" element similar to that recognized under the first amendment in *New York Times*, the Fifth Circuit's decision presents only an issue of state law. There is, therefore, no issue warranting review by writ of certiorari.

DECISIONS BELOW

In addition to the decision of the United States Court of Appeals for the Fifth Circuit referenced in the petition, the United States District Court for the Northern District of Illinois issued a reported decision on certain summary judgment motions, including a summary judgment motion directed at claims asserted by petitioner, during the multidistrict phase of this litigation. *In re ContiCommodity Services, Inc., Securities Litig.*, 733 F. Supp. 1555 (N.D. Ill. 1990), *rev'd in part, Brown v. United States*, 976

F.2d 1104 (7th Cir. 1992). That decision is reproduced in the appendix to this opposition brief, Opp. App. 1a-49a.[2] Following the multidistrict phase of this litigation, this case was transferred to the United States District Court for the Southern District of Texas for further proceedings. That court entered judgment in favor of Conti and Continental on petitioner's remaining claims, pursuant to Fed. R. Civ. P. 54(b), on April 14, 1994. Opp. App. 56a-57a. That judgment incorporated orders entered by the United States District Court for the Southern District of Texas on July 16, 1993 (Opp. App. 50a-51a) and March 25, 1994 (Opp. App. 52a-55a).

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case largely recounts aspects of this long-lived litigation which neither the district courts nor the court of appeals considered relevant to the issues they decided and which, as a result, are discussed nowhere in any of the opinions below. The principal facts that petitioner correctly states are that Conti employed petitioner as chief trader at its Conti-Arbitrage Houston ("CAH") office; that Conti ordered that all of the customer accounts at CAH be closed; that petitioner initially refused to do so; that petitioner, after finally closing the securities and commodity futures positions in the customer accounts, immediately and over Conti's objection began to work at Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"); and that personnel from Conti and Merrill Lynch had a conversation regarding petitioner, during which certain Conti representatives stated their beliefs regarding petitioner's performance during his employment at Conti.

Aside from these facts, the overwhelming balance of petitioner's statement of the case is either irrelevant or

[2] The Seventh Circuit's decision concerned only certain suits for tax refunds, not the case at issue in the petition, and is therefore not reproduced.

contrived. To place the petition in proper context requires brief correction or supplementation of that statement in four important regards. First, Conti closed its CAH office and its customers' accounts after it and its customers suffered multi-million dollar losses as a consequence of petitioner's trading at CAH, and Conti was completely within its rights in so doing. Second, personnel from Conti met with petitioner's subsequent employer, Merrill Lynch, primarily because petitioner had left CAH before completing necessary bookkeeping. In the course of that meeting, Conti representatives discussed their beliefs concerning petitioner's performance during his employment with Conti.[3] Third, this particular litigation began when Conti and Continental sued petitioner and his father, Joe Ragan, alleging that petitioner illegally manipulated customer accounts, including fraudulently allocating trades and funneling millions of dollars from Conti through his father's account to petitioner himself. Finally, although the district court granted summary judgment for Conti and Continental on a ground subsequently nullified by the court of appeals in a separate decision, the decision below rests on an alternative ground that was properly presented to the district court and that was fully briefed before the court of appeals.

1. Conti closed its CAH office after, as the court of appeals noted, "Conti's Houston branch office had incurred more than $55 million in trading losses for the accounts of its arbitrage and speculative customers." App. 4A n.3; *see also* Pet., p. 4 & n.3 (conceding that Conti had paid securities dealers for trading losses of $55 million). In his sole remaining claim here, petitioner does not

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[3] In this regard, petitioner's attempt to portray Conti's actions as a campaign to "blame" him for losses at CAH (Pet., pp. 5-6) is completely inaccurate, although Conti believes that petitioner in fact was responsible for those losses. In particular, petitioner alleges first that Conti threatened petitioner "with the loss of his trading license and the ruin of his career" (Pet., pp. 5-6), but then concedes one page later that the Chicago Board of Trade, after investigating his activities, "summarily suspended" petitioner's license (Pet., p. 7).

allege—and no court has ever found—that Conti acted other than within its rights in closing the customer accounts at CAH.

Petitioner attempts to suggest, however, that Conti and Continental acted improperly in closing the accounts by asserting in his petition that the positions he established for CAH's customers were guaranteed to yield a profit. *See, e.g.*, Pet., p. 2 ("[g]overnment securities have fixed maturity dates and values[;] [a]s a result, the customer loans were always repaid, and profits were realized"); *id.*, p. 4 & n.3. But these assertions ignore the use of repurchase agreements to finance the trading positions, which created financing costs for the customers, and the real costs Conti incurred as a result of the money-losing customer trades. Moreover, the success or failure of petitioner's trading strategy in no way bears on the ground on which the court below rested its decision—that petitioner had failed to produce evidence sufficient to create an issue of fact on the privileged nature of Conti's alleged communications.[4]

2. One day following CAH's closing, petitioner submitted a letter of resignation to Conti and, on June 7, 1984, began working for Merrill Lynch. Pet., p. 4. Conti refused to accept petitioner's resignation because, although he had finally liquidated the positions in customer accounts at CAH, significant recordkeeping work remained to be done.[5] On June 29, 1984, representatives of Conti met with representatives of Merrill Lynch to discuss Conti's efforts to resolve the recordkeeping problems petitioner had left behind.[6] During that meeting, Conti representa-

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[4] Petitioner suggests, with the benefit of hindsight (Pet., p. 4 n.3), that the customers' securities positions would have yielded a net profit if they had not been liquidated. At the time the accounts were closed, however, Conti could not foresee the change in interest rates that later occurred.

[5] These facts could be established by reference to: DK No. 1535-24: ¶ 919; DK No. 1543-4: ¶ 285; DK No. 1534-14: ¶ 508.

[6] DK No. 1543-4: ¶¶ 288-89.

tives also informed Merrill Lynch of their belief that petitioner's trading had resulted in substantial losses that had required Continental to inject over $40 million in capital into Conti.[7] On June 30, 1984, Merrill Lynch fired petitioner because he had told Merrill Lynch that his CAH trading was profitable when, in fact, it had resulted in substantial losses that required Continental to infuse capital into Conti.[8]

3. This particular piece of the complex litigation arising from the closing of CAH began when "Conti filed suit against David Ragan, alleging fraudulent and fictitious transactions." App. 5A; *see also* Opp. App. 3a ("Conti . . . claims the customer parties conspired with David Ragan to have profitable trades allocated to them and that this resulted in Conti having to reimburse customers who received the loss side of the trades."). Conti's claims against petitioner remain pending in the Southern District of Texas.[9]

4. As the Fifth Circuit noted, petitioner counterclaimed against Conti and Continental based upon his termination and Conti's contact with Merrill Lynch, alleging breach of contract, tortious interference with contract, tortious interference with prospective contract, defamation, and fraudulent concealment. App. 5A. District Judge Hart of the Northern District of Illinois, before whom the Judicial Panel on Multidistrict Litigation had consolidated this and other cases arising from petitioner's actions at CAH, granted Conti and Continental summary judg-

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[7] DK No. 1543-4: ¶ 290.

[8] Supplemental Fifth Circuit Record, Vorst Dep., pp. 229-30, 660-61.

[9] Conti does not intend to dismiss those claims until the resolution of a malicious prosecution suit, instituted by petitioner *after* oral argument to the Fifth Circuit, in Illinois state court against Conti, Continental, and their attorneys and accountants. *Compare* Pet., p. 11 n.4.

ment on all of petitioner's claims except for the defamation claim and the tortious interference with contract claim, both of which were based upon the meeting with Merrill Lynch. Opp. App. 38a-44a.

After this case was returned to the Southern District of Texas upon completion of the multidistrict phase of the litigation, Conti and Continental moved for summary judgment on the remaining tortious interference and defamation counts. Conti and Continental primarily argued that petitioner's intervening criminal conviction established the truth of the alleged statements to Merrill Lynch. However, as petitioner concedes, Conti and Continental also argued to the district court that the statements allegedly made to Merrill Lynch were qualifiedly privileged. *See* Pet., p. 10. Indeed, petitioner also concedes that he responded to that argument in the district court. *See* Pet., p. 11 ("Ragan further responded to Conti's and Continental's reference to their purported 'good faith' ").

Chief Judge Norman Black granted Conti and Continental summary judgment on petitioner's defamation and tortious interference counts on the ground that petitioner's criminal conviction (later reversed on appeal) established the truth of the alleged statements to Merrill Lynch. *See* Opp. App. 50a-51a; App. 7A. The Fifth Circuit's subsequent reversal of petitioner's criminal conviction (*see* App. 9A n.7) nullified that ground for decision while petitioner's appeal to the Fifth Circuit was pending in this case. As a result, Conti and Continental argued in their brief to the court of appeals that it should affirm on the alternative ground they had presented to the district court: that the alleged statements made by Conti's representatives to Merrill Lynch were qualifiedly privileged and that petitioner had identified no evidence to overcome that privilege. *See* Pet., pp. 12-15. Before the court of appeals, petitioner argued (as he does here) that Conti and Continental had not adequately presented that argument to the district court. *See* Pet., pp. 15-16. Petitioner also argued

(again as he does here) that the record evidence in fact overcame any qualified privilege. *See* Pet., pp. 16-17.

Notwithstanding these arguments, the Fifth Circuit affirmed the grant of summary judgment, holding that statements made during the meeting with Merrill Lynch were shielded by a qualified privilege (which is applicable both to the defamation and tortious interference claims) and that petitioner had failed to identify any evidence that could overcome that privilege. App. 9A-13A. In particular, relying on Texas law, the Fifth Circuit held that "[a]ccusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege." App. 9A (citing *Schauer v. Memorial Care Systems,* 856 S.W.2d 437, 449 (Tex. App. Houston [1st Dist.] 1993)). The Fifth Circuit further held that "Texas law places on the plaintiff the burden of proof at trial with respect to [the showing of actual] malice" (App. 10A) necessary to overcome the qualified privilege and that, with respect to his defamation claim, petitioner "ha[d] not made a showing that is sufficient to constitute the 'clear evidence' of malice required to defeat a properly supported motion for summary judgment" (App. 11A). For the same reason, the court of appeals "also conclude[d] that Ragan ha[d] not shown a genuine issue of fact as to the 'malicious and intentional action' element in his tortious interference claims." App. 13A.

REASONS FOR DENYING THE PETITION

The petition raises no important issue of federal law. First, the court of appeals correctly articulated the well-settled legal principles governing the parties' respective burdens at the summary judgment stage. Although petitioner attempts to make it appear otherwise, his real argument here is that the court of appeals misapplied the principles that it stated. But, the court of appeals correctly applied those principles to the facts of this case, and

even if it had not, that question would not warrant the exercise of this Court's certiorari jurisdiction. The petition does not suggest any conflict between the decision below and any decision of this Court or any other court of appeals. The most petitioner can say is that is that "[*i*]*f* this published decision begins to [be] followed within the Fifth Circuit or is picked up by other Circuits, then these issues will have significance far beyond this case." Pet., p. 21 (emphasis added). Petitioner's assertion is wrong and is, in any event, far too thin a reed on which to rest a request for a writ of certiorari.

Second, the court of appeals' decision on the merits of the qualified privilege issue raises only an issue of Texas state law. And, in this regard, the Fifth Circuit both correctly stated the Texas law and correctly applied it to the facts of this case. Petitioner's attempt to suggest that the court of appeals' decision on this issue implicates the constitutional doctrine of actual malice under *New York Times v. Sullivan* is baseless. The petition should be denied.

1. Although the standards governing the burdens of a party moving for summary judgment may present "substantial questions of civil procedure" (Pet. p. 20), the issues the petition purports to raise in this case have been settled under Fed. R. Civ. P. 56 and this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The petition asserts that this Court must address "[w]hether . . . a movant may carry the burden of a summary judgment motion simply by asserting generally that the non-movant lacks evidence of an element of his claim . . . without specifying what acts the purported lack of evidence relates to and/or what portion of the record allegedly indicates that lack of evidence." Pet., p. i; *see id.*, p. 20 (identifying question as "what a summary judgment movant must do to sufficiently identify . . . uncontested issues of fact defeating one or more elements of the non-movant's

case and what, if any record evidence he must identify to show that those issues are uncontested").

But the petition's asserted question is completely answered by Rule 56 and *Celotex*. Rule 56 makes clear that a party moving for summary judgment need not submit any evidence in order to present a proper motion. Fed. R. Civ. P. 56(a) ("[a] party . . . may . . . move with or without supporting affidavits for a summary judgment"); Fed. R. Civ. P. 56(b) (same). *See also* Pet., p. 22. And in *Celotex*, the Court expressly held that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." 477 U.S. at 322.

Moreover, this Court in *Celotex* directly addressed the nature of the "showing" that a party must make when moving for summary judgment. This Court first held that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. Nevertheless, this Court made clear that, where the nonmoving party bears the ultimate burden of proof on an issue, the required "showing" is a relatively low standard of "pointing out" that no evidence exists to create a contested issue of fact. "[T]he burden on the moving party may be discharged by 'showing'—*that is, pointing out to the district court*—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325 (emphasis added). Rejecting precisely the claim petitioner makes here, the Court further explained that there is "no express or implied requirement in

Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 323. *See also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990) ("*Celotex* made clear that Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case").[10]

Finally, the supposed worst-case scenario that the petition puts forth—whether a "movant may simply stand up and say the nonmovant has no case and [not] explain what particular aspect of the case is under fire" (Pet., p. 20)—was directly answered by *Celotex*. This Court made clear in *Celotex* that a party moving for summary judgment must specifically identify for the district court a "dispositive issue" on which "the nonmoving party will bear the burden of proof at trial," 477 U.S. at 324, and point out to the court that there is an absence of evidence in the nonmovant's favor on that issue, *id.* at 325. Numerous courts of appeals, including the Fifth Circuit, have recognized this requirement and have squarely held that an unsupported conclusory assertion that the plaintiff simply has no case—the hypothetical scenario petitioner urges this Court to consider here—is not sufficient under Rule 56.[11]

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[10] The Court also noted in *Celotex* that the "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." 477 U.S. at 326. In these circumstances, which are governed by the same rules as summary judgments sought by parties, the district court of course does not make any "showing," but merely directs one party to offer any evidence it may have to support an issue on which it will bear the burden of proof.

[11] Justice White made the same point in his concurring opinion in *Celotex*: "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." 477 U.S. at 328 (White, J., concurring). The courts of appeals have referenced Justice White's concurrence as well as the Court's opinion in explicating the requirements of Rule 56. *See, e.g.*,

2. Nothing in the court of appeals' decision contradicts these well-settled principles. Citing *Celotex*, the Fifth Circuit correctly explained that "[s]ummary judgment is appropriate when the moving party shows that there is no genuine issue of material fact. The moving party may make this showing by pointing out the lack of evidence to support the nonmoving party's case." App. 6A. Although the court of appeals affirmed the district court's grant of summary judgment on a ground different than that adopted by the district court, it followed well-settled authority in so doing. The court below noted that "summary judgment may be affirmed on grounds other than the basis of the district court's decision." App. 9A (citing *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 193 (5th Cir. 1990); *see also Matter of Lewisville Properties, Inc.*, 849 F.2d 946, 950 (5th Cir. 1988)). The cases the court of appeals cited explicitly state the rule that a court of appeals may affirm summary judgment on grounds other than the ground the district court adopted, but only if those grounds were actually presented to the district court. *See Howell Hydrocarbons*, 897 F.2d at 193 & n.7 (noting that it was "affirm[ing] the summary judgment on a ground for which [the moving party] received sufficient notice"); *Lewisville Properties*, 849 F.2d at 950-51. *Compare also Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1146 (5th Cir. 1993) ("Where, as here, the movants for summary judgment advanced several independent arguments in district court in support of their motions for summary judgment, we will affirm if any of those grounds support the district court's decision.").

3. Therefore, the petition presents, at most, a claim that the court of appeals erred in applying these well-settled principles to the facts of this case. But even as

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Fano v. O'Neill, 806 F.2d 1262, 1265 (5th Cir. 1987) (quoting Justice White); *Beatty v. WMATA*, 860 F.2d 1117, 1120-21 (D.C. Cir. 1988); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 n. 19 (11th Cir. 1991) (en banc).

to this narrow claim—that the Fifth Circuit affirmed the grant of summary judgment on a ground as to which petitioner had no notice—the petition is without merit. As the Fifth Circuit noted, Conti and Continental pleaded the defense of qualified privilege (App. 11A), and, as petitioner concedes, they raised that issue explicitly in their brief in support of summary judgment in the district court, and petitioner responded to that argument in the district court (*see* Pet., pp. 10, 11). Moreover, the Fifth Circuit did not surprise petitioner with its holding. Petitioner admits that Conti and Continental focused their brief to the Fifth Circuit on the qualified privilege issue. Pet., pp. 12-15. Petitioner both argued to the Fifth Circuit that the issue had not been properly raised in the district court (Pet., pp. 15-16) and marshaled all of the evidence in the record that he believed would require a trial with respect to qualified privilege (*id.*, pp. 16-17). The Fifth Circuit held that evidence to be insufficient to create a genuine issue of material fact. App. 9A-13A.

Petitioner therefore seeks certiorari in circumstances that (unless this Court also were to grant certiorari on a question solely of state law, *see* pp. 13-16 *infra*) give him no possibility of prevailing on remand. Even if petitioner were to prevail on the merits of this procedural question and establish that Conti and Continental had failed adequately to raise the issue of qualified privilege before the district court, on remand petitioner would still suffer summary judgment because the court of appeals has already considered petitioner's evidence and found it wanting on the merits. Petitioner is not entitled to additional discovery and does not argue (and has never argued) that additional discovery was necessary before summary judgment could be granted. *Compare* Fed. R. Civ. P. 56(f). Certiorari is not warranted in these circumstances.

4. Finally, petitioner's second suggested issue for review on certiorari—that the court of appeals' decision contravenes *New York Times v. Sullivan*, 376 U.S. 254

(1964)—in fact raises only an issue of Texas state law. No first amendment issues are presented in this case. As petitioner candidly admits: "This case was decided under the Texas law of defamation and malice." Pet., p. 25. Although Texas common law includes an "actual malice" element, that element has nothing to do with the first amendment "actual malice" standard articulated in *New York Times*. Indeed, petitioner concedes, although he attempts at times to argue otherwise, that the Texas law on qualified privilege is not identical to the *New York Times* actual malice test. *See* Pet., p. 26 ("Texas muddies the waters slightly, sometimes making it appear that the 'serious doubts' element applies to knowingly false statements as well as to those spoken with reckless disregard for the truth") (citing *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 771-72 (Tex. 1994)). This Court should not grant certiorari on an issue solely of state law. "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *accord Butner v. United States*, 440 U.S. 48, 57-58 (1979); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

Petitioner's reliance on *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989), to assert that Conti and Continental were not entitled to summary judgment (Pet., pp. 26-27) is misplaced, for petitioner confuses the substantive aspects of the Texas doctrine of qualified privilege with Texas procedure on summary judgment. In federal courts in diversity cases, procedural matters are governed by federal, not state, law. *Hanna v. Plumer*, 380 U.S. 460, 465, 473 (1965). As *Casso* acknowledges, "Summary judgments in federal courts are based on very different assumptions, with different purposes, than summary judgments in Texas." 776 S.W.2d at 555-56.[12] Petitioner's assertion

[12] Discussing *Celotex*, the Texas court noted that, in the federal system, summary judgment is " 'not disfavored' " but is an " 'in-

that *Casso* determined for the court of appeals the "showing" that Conti and Continental were required to make (*see* Pet., p. 27) is thus unavailing. On the other hand, there is no dispute as to the applicable substantive rule: petitioner had the burden to establish actual malice to overcome the qualified privilege. *See Hagler,* 884 S.W.2d at 771-72.

In all events, within the appropriate federal procedural rules, the Fifth Circuit correctly construed and applied Texas law to the facts of this case. As the Fifth Circuit held, Texas requires that the plaintiff demonstrate "actual malice" in order to overcome a qualified privilege and that "[a] finding of such malice requires 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" App. 10A (quoting *Hagler,* 776 S.W.2d at 571). As the Fifth Circuit also noted, Texas law requires the plaintiff to demonstrate actual malice by "clear evidence." *See* App. 10A-11A.

Petitioner contends that Conti defamed him by stating to Merrill Lynch that he was dishonest, had caused huge losses at CAH, and had improperly allocated trades for the benefit of his father and other select customers. Pet., p. 6. Petitioner does not dispute that such alleged statements were qualifiedly privileged. Rather, he attempts to suggest that he could overcome the privilege by demonstrating "actual malice." But, the only evidence to which petitioner pointed below (and the only evidence to which he points before this Court) that even remotely bears on the question of actual malice is the "fact" that Conti representatives met with Merrill Lynch and stated their suspicions *before* an audit report on CAH had confirmed petitioner's wrongdoing. *See* App. 11A; Pet., pp.. 16-17, 27. But that fact,

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tegral part'" of procedure, whereas, in Texas, the courts "use summary judgments merely 'to eliminate patently unmeritorious claims and untenable defenses.'" *Id.* at 556 (quoting *Celotex,* 477 U.S. at 327; *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 n.5 (Tex. 1979)).

as the Fifth Circuit recognized, does not establish that Conti's representatives had actual knowledge that the allegedly defamatory statements were false or that they acted with reckless disregard of the truth or falsity of those statements. *See* App. 11A.

Petitioner's central complaint is that Conti and Continental did not provide anything more than an affidavit and deposition testimony establishing that Conti's representatives acted in good faith. *See* Pet., pp. 26-27.[18] And, petitioner relies on *St. Amant v. Thompson*, 390 U.S. 727 (1968), to assert that a party's testimony that he published a statement in good faith is not sufficient to defeat a defamation claim. *See* Pet., pp. 25-26. But, *St. Amant*, of course, considered the actual malice question in the context of the first amendment, not a qualified privilege under state law, and it is, therefore, not controlling in this case. Even if it did apply, moreover, it would support the court of appeals' decision. Although this Court did hold that, at a trial on the merits, "[t]he defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true" (390 U.S. at 732), this Court made clear that the plaintiff must have "*evidence*" that would suggest "that the defendant in fact entertained serious doubts as to the truth of this publication" (*id.* at 731). The Fifth Circuit's decision here rested on *petitioner's* inability to produce any such evidence sufficient to carry his burden of proof. The Fifth Circuit's decision was correct, and certiorari should not be granted to review this question.

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[18] Petitioner also attempts to create the impression that Conti and Continental somehow presented "new" evidence to the court of appeals. *See* Pet., pp. 18, 15, 24. The evidence to which Conti and Continental referred in the court of appeals was part of the record before the district court and the record on appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID T. PRITIKIN
CONSTANTINE L. TRELA, JR.*
JAMES B. SPETA
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

February 20, 1996

* Counsel of Record

APPENDIX

[733 F. Supp. 1555]

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

MDL No. 644

IN RE: CONTICOMMODITY SERVICES, INC.,
SECURITIES LITIGATION

January 11, 1990

Orders on Reconsideration Feb. 7, 1990
and Feb. 22, 1990

MEMORANDUM OPINION AND ORDER

HART, District Judge.

This multidistrict litigation is presently before the court on various motions for summary judgment. Motions have been filed in 13 of the remaining 15 cases.[1] The motions have been fully briefed and the court heard oral argument on the motions on October 27, 1989. This opinion will discuss all the pending motions and will be referred to as the "Summary Judgment Opinion" or "SJO". The discussion in this case is generally organized by parties. A separate order will be issued in each case making reference to the SJO and specifically stating the ruling as to the individual case.

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[1] The parties have represented that *Abraira v. ContiCommodity Services, Inc.*, No. 86 C 2100 (N.D.Ill.), and *Landauer v. United States*, H-87-1038 (S.D.Tex.), are close to settlement. They will be dismissed at the next status hearing.

I. BACKGROUND

This litigation centers around trading activity at the ContiArbitrage-Houston office ("CAH") of ContiCommodity Services, Inc. ("Conti"). Conti is a fully owned subsidiary of Continental Grain Company ("Continental"). David Ragan was a vice president of Conti and the manager of CAH. CAH was open from August 1981 until May 1984. Conti was a futures commission merchant registered with the Commodity Futures Trading Commission ("CFTC"). During the relevant time period, I.C. Hemmings; C.P. Brown; B & H Investment Services, Ltd. ("B & H"); H & B Investment Services, Ltd ("H & B"); W. Paul Harris; Richard Sanborn; Grayson Whitehurst; Paul Sarpi; SSJ Associates, Inc.; Marc Enright; Floyd Bender; Dorothy Bender; Joe Ragan; Cynthia Frakes; and Owen Frakes maintained accounts at Conti and authorized David Ragan to trade for their accounts.[2]

David Ragan was to conduct arbitrage trading for the customers. Arbitrage trading is the simultaneous purchase and sale of the same or equivalent securities or commodities in different markets or on different exchanges at different prices, in order to profit from the price differences between markets. The arbitrage trading relevant to this case primarily involved playing the cash market against the futures market in United States government securities. Purchase of the cash government securities (treasury bills, bonds, notes) were financed by repurchase agreements ("repos") and reverse repos. A repo is a short term collateralized loan. The seller of the security agrees that, after a negotiated period of time, the seller will repurchase the security from the original buyer

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[2] These parties are known collectively as the "customer parties." All but the Frakes and Joe Ragan are represented by the same counsel and have been referred to during this litigation as "certain customer paries." Brown, Hemmings, B & H, and H & B are sometimes grouped together as the "Brown & Hemmings parties." Sanborn, Sarpi, Whitehurst, and SSJ are sometimes grouped together as the "Sanborn group."

for a different price which includes interest. A reverse repo is a purchase/resale agreement whereby a buyer agrees to resell a purchased security to the original seller at a price which also reflects interest. Trading of this type involved a large amount of debt that had to be reflected in the financial statements of Conti and Continental.

Certain customer parties complain that David Ragan acted improperly in that he did not conduct the type of trading promised, made intercustomer trades, made prearranged trades, made block trades, and failed to timely and properly allocate to specific customers the trades he was making. They seek to hold Conti, Continental, and certain officers of Continental and Conti [3] liable on theories of agency, piercing the corporate veil, and personal involvement. Certain customer parties also complain that Continental required Conti to close out accounts in a short period of time resulting in large losses and lost profits. Certain customer parties claim they were damaged in that they had actual losses and interest expenses, lost profits, and lost tax advantages. The Frakes and Joe Ragan claim that Conti did not distribute the entire balances remaining in their accounts when CAH was closed down. The Frakes and Joe Ragan do not accuse David Ragan of any wrongdoing. Conti, on the other hand, claims the customer parties conspired with David Ragan to have profitable trades allocated to them and that this resulted in Conti having to reimburse customers who received the loss side of the trades. Conti has also brought suit against David Ragan for the damages he allegedly caused, including to customers not parties to this suit. Ragan has countersued Conti for breach of contract, interference with contractual relations, and other claims.

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[3] These defendants will be referred to collectively as the "Conti parties." The officers will be referred to as the "Conti individual defendants."

A number of other parties are also involved in this litigation. Arthur Andersen & Company ("Andersen") audited the books of Continental and Conti. Certain customers claim Andersen is liable to them for failing to reveal to them the improprieties Andersen allegedly found at Conti. Prescott, Ball & Turben, Inc. ("PBT") and its former employee John Luikart allegedly conducted prearranged trades with Conti for which PBT received a certain percentage of profit that was in essence a commission. PBT claims it did not know the trades were for Conti customers, not Conti itself. Certain customers claim PBT is responsible for some of their damages in that some of the prearranged trades were assigned to them. Conti claims PBT improperly conspired with David Ragan and obtained commissions it was not entitled to. After CAH was closed, David Ragan was employed by Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and certain customers transferred their accounts there. Improper practices allegedly continued and certain customers also brought suit against Merrill Lynch. Conti purchased a fidelity bond from Reliance Insurance Company ("Reliance") in 1984. Conti has brought suit to collect on the bond based on liabilities it has incurred as a result of trading at CAH. Also joined in this litigation are tax refund suits brought by certain customers and which involve the deductibility of losses claimed from trading at CAH.

In resolving each motion for summary judgment, the entire record is considered with all reasonable inferences drawn in favor of the nonmovant and all factual disputes resolved in favor of the nonmovant. *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago,* 693 F.Supp. 666, 669 (N.D.Ill.1988), *aff'd,* 877 F.2d 1333 (7th Cir. 1989). As regards choice of law issues, where the parties have not made any argument as to which state's law applies, it is assumed that the law of the state of the district where the case was filed applies. However, where there is no citation to that state's law, it is further assumed that the state's law is the same as Illinois. Similarly,

where no law is cited from other circuits where cases are filed, it will be assumed that the applicable law is the same as that in the Seventh Circuit.

II. CUSTOMER PARTIES AND CONTI PARTIES

A. Overview

The Conti parties have moved for summary judgment dismissing all the claims of the customer parties on the ground they have shown no damages. Continental also moves to dismiss all claims on the ground its corporate veil cannot be pierced. Conti individual defendants also move to dismiss all claims on the ground their personal involvement has not been shown. All the Conti parties also argue that certain specific claims cannot be proven. Conti has not moved for summary judgment on any of its claims against the customer parties. The customer parties generally oppose the motions of the Conti parties, but do concede certain claims should be dismissed. The customer parties also move for summary judgment on some of their claims against Conti and move to dismiss some of Conti's claims against them. All the cases involving claims between the customers and Conti parties were brought in Texas except for Conti's suit against the Brown & Hemmings parties and the claims between Conti and the Frakes. The latter are Illinois cases.

The customer parties have conceded that certain of the following claims should be dismissed: (1) 1933 Securities Act; (2) California Securities Act; (3) Implied Covenant of Good Faith; (4) Tortious Interference with Customer Contracts; (5) Commodity Exchange Act § 4d(2); (6) Commodity Exchange Act Control Person; (7) Acquiescence in Fraud; and (8) Failure to Control a Subsidiary.

B. Damages

At the outset of this case, defendants objected to certain customers' complaints on the grounds that Fed.R. Civ.P. 9(b) required that the customers specify which

particular trades were improper. Certain customer parties asserted that they would be unable to specify which trades were improper without discovery. Accordingly, the court did not require trade specificity in the pleadings. During the course of discovery the defendants asked certain customer parties to specify which trades were under attack. Certain customer parties again failed to respond and informed the court of their inability to identify which trades were improper. During pretrial proceedings, certain customer parties were informed that they would be required to specify which trades they contended were improper, "bad", or a sham.

Previous orders of this court have required that any party making a claim based on bad or sham trades specificially identify each such trade upon which the claim rests. *See, e.g.*, Orders dated April 27, 1987; October 22, 1987; May 15, 1989; June 8, 1989; August 25, 1989; September 11, 1989. On September 11, 1989, this court dismissed the customer parties' claims to the extent the claims were based on bad or sham trades because the customers had failed to identify such trades. No attempt was made at that time to identify which particular claims that order applied to. The Conti parties argue all claims should be dismissed for failure to identify trades. Certain customer parties again argue the trades cannot be identified.

The claims of the Frakes and Joe Ragan are not based on allegations of bad trades. Their claims, therefore, cannot be dismissed based on failure to identify trades. It is also clear that there is a factual dispute as to whether they suffered any damages. Account statements exist showing that they were entitled to larger distribution than they actually received from their accounts.

Certain customer parties have failed to identify any claim against the Conti parties that does not involve alleged bad or sham trades. With the exception of a few examples identified by the certain customer parties

and trades Conti has identified as bad trades, certain customer parties have not identified specific bad trades. They continue to argue that it is impossible to identify the bad trades and that they can show damages without specifying the bad trades. This court has previously ruled that the customers had to identify bad trades and struck any claims based on bad trades for failure to identify the trades. *See* Order dated September 11, 1989. That ruling shall essentially remain in effect. At trial certain customer parties will not be permitted to prove any damages based on specific trades except for the specific examples already identified by them or Conti. Also, in proving liability and damages at trial, certain customer parties will not be permitted to identify any specific bad trades other than those already identified.

The customer parties will not be precluded from attempting to prove liability and damages by other means. Therefore, they will be permitted to attempt to show that David Ragan and Conti failed to follow the trading program promised and that, if they had, the customers would have avoided an overall loss and instead have made a profit. They have presented evidence to support this theory and therefore a disputed issue of fact exists as to whether damages can be shown. The projection of potential earnings from a properly followed program must be computed to an appropriate date. Alternatively, those customers who sustained overall losses can obtain damages equal to their losses (including commission expenses) to the extent they can prove specific improper practices requiring the rescission of any trading agreement or the reimbursement of losses. To the extent actual injury and causality can be shown, certain customer parties may also obtain damages for tax advantages lost due to specific improper practices. These, plus nonduplicative damages arising from the few bad trades that have been specifically identified, are the only damages that certain customer parties will be permitted to present at trial. Certain customer parties will not be permitted to

obtain any *additional* damages based on damages specifically arising from a late allocation, prearranged trade, intercustomer trade, block trade, premature closing of positions, or the shutdown of Conti except as to those few bad trades that have been specifically identified.

It must also be noted that certain allegations, *e.g.*, misrepresentations, may involve discrete actions. For example, except to the extent it is proven to be part of a previously existing scheme or conspiracy, a misrepresentation made in 1983 can only cause subsequent injury. If a customer can only show the net loss or lost profits suffered during the entire investment period, the customer cannot assert damages prior to a proven act of wrongdoing.

C. Liability of Continental

The customers have presented the following evidence in support of their claim that Continental can be liable as an alter ego of Conti: (1) Continental owns substantially all of Conti's stock; (2) Conti's chairman of the board was an executive vice-president of Continental; (3) Conti borrowed only from Continental and Continental provided significant capital infusions; (4) Conti was undercapitalized for short periods during 1982 and 1984 and may presently have funds insufficient to satisfy any judgment that may be entered against it; (5) Continental closed Conti and Conti is presently a nonfunctioning shell with a $35,000,000 reserve; (6) Continental controlled decisions at Conti including reducing positions, shutting down CAH, restricting certain trading practices, and approving capital expenditures over $100,000; (7) Continental and Conti had consolidated financial statements; (8) funds of the two corporations were commingled to a limited degree; (9) Continental guaranteed some of Conti's debts; (10) Continental was involved in the hiring and firing of some Conti employees; and (11) Continental was kept informed of internal matters at Conti.

Under Texas and Illinois law, the corporate veil can be pierced where the parent so controls the subsidiary that the subsidiary is a mere instrument or tool and adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. *Miles v. AT & T*, 703 F.2d 193, 195 (5th Cir.1983); *Van Dorn Co. v. Future Chemical & Oil Corp.*, 753 F.2d 565, 569-70 (7th Cir.1985); *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 422 (5th Cir.1980). The customers have pointed to sufficient evidence of control, undercapitalization, and other factors to prevent the entry of summary judgment. If Conti is ultimately found to be liable, it may be an injustice to permit Continental to order Conti closed down and left with funds insufficient to satisfy liabilities and not have Continental be liable for injuries caused in part by a practice of Conti ordered or approved by Continental.

The customers have generally put in separate counts their various theories for holding Continental liable. Continental argues that these other theories are legally or factually deficient. Most of Continental's other arguments, however, fall to the side in light of there being facts to support piercing the corporate veil. It is therefore unnecessary to consider further whether the other counts should be dismissed. The issue of whether or not Conti was the alter ego of Continental must be tried.

D. Liability of Conti Individual Defendants

It is argued that there is no evidence of personal involvement by the Conti individual defendants in commission of the alleged improprieties. It is also argued that there is insufficient evidence of intent. The exhibits cited by the customers in response to the summary judgment motions have been examined and sufficient direct or inferential evidence of individual involvement and scienter has been found to require a trial on the issue of individual responsibility. Claims may be pursued against the Conti individual defendants.

E. RICO[4]

The Conti parties initially argued the customers could not identify a "person" distinct from the "enterprise" as required under 18 U.S.C. § 1962(c). *See Liquid Air Corp. v. Rogers,* 834 F.2d 1297, 1306-07 (7th Cir. 1987), *cert. denied,* —— U.S. ——, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989). The customers responded that Conti, Continental, and CAH in combination are the enterprise and that those individual entities and the individual defendants are persons distinct from the enterprise. *See Fustok v. ContiCommodity Services, Inc.,* 618 F.Supp. 1074 (S.D.N.Y.1985). In their reply, the Conti parties concede the validity of the customers' position, but argue it is not the enterprise alleged in the complaints. The case, however, is now before the court on summary judgment. To the extent the pleadings are inconsistent, they can be amended to conform to the evidence. The § 1962(c) claims will not be dismissed for failure to identify an enterprise.

The Conti parties also argue the customers have no standing to bring a § 1962(a) RICO claim because there is no showing of injury from the use or investment of racketeering income. Although apparently a minority view, this court has held that § 1962(a) contains no such requirement. *See Mid-State Fertilizer,* 693 F.Supp. at 671-73. The Seventh Circuit, and apparently the Fifth Circuit as well, have not yet decided this issue. *See Mid-State Fertilizer,* 877 F.2d at 1340 n. 1 (Ripple, J., concurring). Subsequent to this court's decision in *Mid-State Fertilizer,* two circuit courts reached the contrary conclusion. *See Rose v. Bartle,* 871 F.2d 331, 357-58 (3d Cir.1989); *Grider v. Texas Oil & Gas Corp.,* 868 F.2d 1147, 1149-51 (10th Cir.1989), *cert. denied,* —— U.S. ——, 110 S.Ct. 76, 107 L.Ed.2d 43 (1989). The posi-

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[4] Arguments as to failure to identify trades and lack of personal involvement of the Conti individual defendants are sufficiently discussed in §§ II(B) and II(D) *supra.*

tion taken in *Mid-State Fertilizer*, however, is still found to be more persuasive. The § 1962(a) claims will not be dismissed for lack of standing.

Conti and Continental argue they cannot be vicariously liable under RICO. The scope of such liability is unclear in this circuit. *See D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 966-68 (7th Cir.), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2833, 100 L.Ed.2d 933 (1988); *Liquid Air*, 834 F.2d at 1307. A recent case makes clear, though, that *D & S Auto Parts'* exclusion of *respondeat superior* liability can apply only to corporation that are also the RICO enterprise. *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir.1989). As already discussed above, Conti and Continental are not the enterprise for purposes of the § 1962(c) claim. To the extent either of them is still alleged to be the enterprise for a § 1962(a) or (b) claim, those claims can still proceed on a *respondeat superior* theory since there is evidence that at least some of the allegedly improper employee acts were intended to benefit the corporations, not just the employee.

None of the RICO claims are dismissed on their merits.

F. Statute of Limitations

The Conti parties move for summary judgment on the Commodity Exchange Act, Rule 10b-5, and state law claims of certain customer parties. It is agreed that the applicable period for each of these claims is two years and that the claims were not brought within two years. The customers, however, argue that discovery of the claims did not occur until less than two years before they filed their complaints. On the record presented, whether the complaints were filed within two years of discovery and whether the customers exercised reasonable diligence is a question of fact that cannot be resolved on the motions for summary judgment.

G. Commodity Exchange Act

The customers have brought claims under § 22(a) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 25(a), which expressly provides a private right of action under the CEA. Continental and the Conti individual defendants argue that statute does not apply to them. Section 22(a)(1) provides that any person (other than specified organizations not involved in this case) who violates the CEA or who willfully aids, abets, counsels, induces, or procures the commission of such a violation shall be liable for actual damages resulting from one or more of four enumerated transactions (*see* § 22(a)(1)(A)-(D)) and caused by the CEA violation. Section 22(a)(2) provides, except as to those circumstances enumerated in § 22(b) and not argued to be applicable here, that this is the exclusive remedy under the CEA. The plain language of this statute makes clear that there is only a private right of action where the damages are caused by one of the transactions enumerated in § 22(a)(1)(A)-(D) and the only reported case on the subject so holds. *Grossman v. Citrus Associates of New York Cotton Exchange, Inc.*, 706 F.Supp. 221, 230-231 (S.D.N.Y. 1989). The customers argue "numerous courts" have held to the contrary. They, however, cite no court cases in support of that assertion, only CFTC reparation actions under § 14 of the CEA, 7 U.S.C. § 18. Those cases are not on point. To make a claim under § 22(a), the customers must show damages resulting from one of the transactions enumerated in the statute.

The customers argue that their damages arose from a transaction described in § 22(a)(1)(B) in that Continental and the Conti individual defendants made a "contract of sale of [a] commodity for future delivery." They argue these parties ordered the fiscal year end winddowns and shutdown at Conti. The customers concede, however, that these were not the closing out of futures, but the close out of cash positions. They argue, nevertheless,

that the closing of cash positions affected trading in commodity accounts. Although not fully set forth in § IV(A) of their brief, the customers' argument apparently is as follows. The customers made or purchased futures contracts through Conti. The activity of Conti allegedly violated various provisions of the CEA. This alleged scheme involved the sale and purchase of both cash and futures positions. The winddowns and shutdown ordered by Continental and the Conti individual defendants are also claimed to be part of this scheme and therefore those defendants aided, abetted, or induced the scheme of Conti which involved the making or sale of futures contracts. Continental and the Conti individual defendants are claimed to be liable as aiders and abetters.

Continental and the Conti individual defendants, however, point to the plain language of subsections (A) through (D) of § 22(a)(1) and argue that "such person" as used in each of those subsections must also be the violator. Since "such person" in this case can only be Conti or David Ragan, it is argued Continental and the Conti individual defendants cannot be liable under § 22(a). Looking solely to § 22(a), this argument appears correct and is fully consistent with the plain language of the statute. *Grossman,* 706 F.Supp. at 230, is in accord with this argument. This argument, however, ignores 7 U.S.C. § 13c(a) which provides:

> (a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible for such violation as a principal.

It is this statute which enables an injured party to bring a court suit against an aider, abetter, inducer, combiner, etc. who was not the "such person" under § 22(a)(1)(A)-(D). *See* H.R.Rep. No. 565, 97th Cong., 2d Sess., pt. I, at 104-05, 142, *reprinted in* 1982 U.S.Code Cong. & Admin.News 3953-54, 3991. The customers have claims against Continental and the Conti individual defendants under the CEA.

The Conti parties argue the CEA claims based on breach of fiduciary duty should be dismissed. However, to the extent the breach involves misrepresentations, a claim can be made under the CEA. *See United States v. Dial,* 757 F.2d 163, 168 (7th Cir.), *cert. denied,* 474 U.S. 838, 106 S.Ct. 116, 88 L.Ed.2d 95 (1985). *Cf. Disher v. Information Resources, Inc.,* 691 F.Supp. 75, 86 (N.D.Ill.1988), *aff'd,* 873 F.2d 136 (7th Cir.1989). As the Conti parties point out, there may be no real distinction between the claims labeled fiduciary breach claims and those labeled as being fraudulent misrepresentations in violation of the CEA, but the lack of distinctive elements for a claim does not require that one be dismissed.

The customers' claim for failure to supervise in violation of CFTC Regulation 166.3 will be dismissed. Claims for violation of CFTC regulations can only be pursued in reparation proceedings under § 14 of the CEA, not in civil actions for damages pursuant to § 22. *Khalid Bin Alwaleed Foundation v. E.F. Hutton & Co.,* 709 F.Supp. 815, 819-20 (N.D.Ill.1989). *Accord Khalid Bin Talal Bin Abdul Azaiz Al Seoud v. E.F. Hutton & Co.,* 720 F.Supp. 671, 676 (N.D.Ill.1989).

H. Civil Conspiracy

The customers have brought common law conspiracy claims against Conti and Continental. Relying primarily on *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984),

Conti and Continental argue a subsidiary and parent cannot conspire with each other. That decision, however, is limited to the context of antitrust actions. *Ashland Oil*, 875 F.2d at 1281. Texas common law, which governs most of the claims, recognizes conspiracies between parents and subsidiaries. *Metropolitan Life Insurance Co. v. La Mansion Hotels & Resorts, Ltd.*, 762 S.W.2d 646, 652 (Tex.Ct.App.1988). Under Illinois law, an agent cannot conspire with a principal. *Salaymeh v. InterQual, Inc.*, 155 Ill.App.3d 1040, 108 Ill.Dec. 578, 581, 508 N.E.2d 1155, 1158 (1987). As the Conti parties have argued on another issue, though, a subsidiary is not necessarily an agent of its parent. Conti and Continental also argue at length that they are distinct entities. To the extent the customers fail to pierce the corporate veil or hold Continental liable on agency principles, they may still be able to prove a conspiracy between Conti and Continental. *Compare Thomas v. Rohner-Gehrig & Co.*, 582 F.Supp. 669, 673 (N.D.Ill. 1984). The civil conspiracy claims will not be dismissed.

I. Tortious Interference with Contract

The customers have dropped any claim that the Conti parties interfered with a contract between the customers and David Ragan. The parties now agree that the contract allegedly interfered with was one between the customers and Conti. Conti argues it cannot be liable for interfering with a contract it is a party to. Continental and the Conti individual defendants argue that, as Conti's parent and officers of Conti or its parent, they were qualifiedly privileged to take the actions they took. Conti, however, can be liable for interfering with the contract to the extent it conspired with Continental and Continental's acts were not privileged. *See Boyles v. Thompson*, 585 S.W.2d 821, 836 (Tex.Civ.App.1979). Whether or not a parent or corporate officers were qualifiedly privileged depends on a variety of factors and the particular circumstances. *Maynard v. Caballero*, 752 S.W.2d 719, 721 (Tex.Ct.App.1988); *Frank Coulson*

Inc.-Buick v. General Motors Corp., 488 F.2d 202, 206 (5th Cir.1974); *Langer v. Becker*, 176 Ill.App.3d 745, 126 Ill.Dec. 203, 206-07, 531 N.E.2d 830, 833-34 (1988), *appeal denied*, 125 Ill.2d 566, 130 Ill.Dec. 481, 537 N.E.2d 810 (1989). This includes questions of good faith and malice. *See Sakowitz, Inc. v. Steck*, 669 S.W.2d 105, 109 (Tex.1984); *Langer*, 126 Ill.Dec. at 206-07, 531 N.E.2d at 833-34. The question of privilege is not one that can be resolved on summary judgment on this record.[5]

J. Inducing Breach of Fiduciary Duty

Relying on a privilege argument the same as that made regarding tortious interference with contract, Continental and the Conti individual defendants move to dismiss the inducing breach of duty claims. As discussed in § II(I), there are factual disputes which preclude summary judgment.

K. Fraudulent Concealment

Continental argues it had no duty to disclose facts and, even if it did, the requisite intent cannot be shown. There is, however, evidence from which it can be inferred Continental may have intentionally covered up the closing out of positions. Whether or not Continental had a duty to disclose turns on the question of whether Conti was Continental's alter ego or agent. Since the latter cannot be resolved on summary judgment, neither can the former. Summary judgment cannot be granted on the fraudulent concealment claims. It is noted, however, that, to the extent this claim is not proven as part of an overall scheme affecting the customers' trading activity, no claim can be shown since the customers have not iden-

[5] If the customers succeed at piercing the corporate veil, then there may be a basis for denying the interference with contract claim. *See Deauville Corp. v. Federated Department Stores, Inc.*, 756 F.2d 1183, 1196-97 (5th Cir.1985). Piercing the corporate veil, however, remains a contested issue.

tified the closed out positions and therefore cannot prove any damages arising solely from the closing out of positions.

L. Conversion

Conti argues that the conversion claims against it are governed by Illinois law and that the property allegedly converted was intangible property to which Illinois conversion law does not apply. The customers argue Texas law applies and, even if Illinois law applies, government securities and cash are tangible property.

The Frakes' case was filed in Illinois, as was the Brown & Hemmings counterclaim against Conti. The other customer cases are all filed in Texas. In each case, the law of the forum state, including its choice of law rules, apply. *Klaxon Co. v. Stentor Electric Manufacuring Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Both Illinois and Texas follow the "most significant relationship" test of Restatement (Second) of Conflict of Laws § 145 (1971). *Sommers v. 13300 Brandon Corp.*, 712 F.Supp. 702, 704 (N.D.Ill.1989); *Gutierrez v. Collins*, 583 S.W.2d 312, 319 (Tex.1979). Comment i to § 147 of the Restatement states that on tort questions regarding conversion, the law of the state where the alleged converter dealt with the chattel usually will apply.[6] Prior to the shutdown of CAH, Conti dealt

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[6] Whether or not the customers had a property interest and whether that interest is one in tangible property would be governed by the law selected by application of the rules set forth in §§ 244-45 of the Restatement. *See* Restatement § 247 comment i. Those, however, are not the type of questions that need to be addressed on the present motion. The only issue raised on summary judgment as regards conversion is whether the applicable state law recognizes the tort of conversion for the property involved in this case. Since it is held that Texas law applies and there is no argument that Texas law does not provide that intangible property can be converted, it is unnecessary to determine the character of the property.

with the customers' accounts in Houston. Therefore, unless the most significant relations test clearly points to another state, Texas law controls on the issue of whether a tort of conversion exists for the conversion of intangible property.

The factors to consider in applying the most significant relationship test are (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (d) the place where the relationship centered. *Sommers*, 712 F.Supp. at 704. The relationship between the parties centered in Houston, Texas where CAH was located. The conduct causing the injury was ordered from Conti's and Continental's offices in Illinois and New York, but was executed at CAH in Houston. Conti and Continental are incorporated in Delaware. Conti's principal place of business is in Illinois and Continental's in New York. The customer parties reside in various states, with only one residing in Texas and apparently none in Illinois. Where the injury should be considered to have occurred cannot be particularized and is not an important factor in this type of case. *See* Restatement § 145 comment e. The above factors do not override the presumption that Texas, as the place where Conti dealt with the property, should be the source of the applicable law.

Texas law applies to the conversion claims in both the Texas cases and the Illinois cases. Therefore the customers may proceed on claims for conversion of intangible property. Certain customer parties, however, have not identified the positions that were improperly closed out and therefore converted. Their failure to identify bad trades precludes them from further pursuing the conversion claims. The Frakes and Joe Ragan, who claim Conti converted the balances in their accounts, not that Conti improperly closed out their positions, can continue with their conversion claims.

M. Breach of Fiduciary Duty/Fraud

There is evidence of personal involvement and intent of Evers and Goldschmidt. *See* § II(D) *supra.* These claims will not be dismissed.

N. Punitive Damages

The Conti parties argue there is insufficient evidence to show wantonness, malice, oppression, or circumstances of oppression. The customers have pointed to sufficient evidence from which such can be inferred. The prayers for punitive damages will not be stricken.

O. State Securities Act

Except for the California Securities Act claim, which the customers concede should be dismissed, none of the state securities law claims are dismissed.

P. Florida Anti-Fencing Act

Some of the customers are Florida residents and there is evidence of acts performed in Florida. However, just as certain customer parties cannot show damages from any conversion, *see* § II(L) *supra,* they cannot show damages under the Anti-Fencing Act. All the Florida Anti-Fencing Act claims are dismissed except those brought by the Frakes.

Q. Texas Deceptive Trade Practices Act

The Conti parties argue Brown and Hemmings are business consumers who are excluded from bringing an action under the Texas Deceptive Trade Practices Act, Tex. Bus. & Com.Code Ann. § 17.01 *et seq.*, because they have assets in excess of 25 million dollars. *See id.* § 17.45(4). The exception the Conti parties rely on, though, was not added to the Act until August 29, 1983. *See* Acts 1983, 68th Leg., p. 4943, ch. 883 §§ 2-3. The Act amending the statute provides: "This act applies only to a contract

executed on or after the effective date of this Act. A contract executed before the effective date of this Act is governed by the law in effect when the contract was executed." *Id.* § 4. Brown and Hemmings entered into a contract with Conti prior to August 29, 1983. *See* § II(I) *supra.* The exception for business consumers with assets in excess of 25 million dollars does not apply to Brown's and Hemmings's claims against the Conti parties. *Government Employees Credit Union of San Antonio v. Fuji Photo Film U.S.A., Inc.*, 712 S.W.2d 208, 210-11 (Tex.Ct.App.1986).

R. Certain Customer Parties' Motions

Certain customer parties have moved for summary judgment in their favor on some of their claims against Conti. They have also moved to dismiss some of Conti's claims against them. Since there are factual disputes as to the statute of limitations, the customers cannot possibly be entitled to summary judgment on any of their claims. Conti has presented evidence from which it can be inferred that the customers conspired with David Ragan. The evidence is weak, but not so incredible as to be unbelievable. That evidence is a basis for denying summary judgment on both the customers' claims and Conti's claims. The customers' motions for summary judgment are denied in their entirety.[7]

III. CUSTOMERS AND ARTHUR ANDERSEN

Two cases, *Hemmings v. Fribourg,* No. H-86-4361 (S.D.Tex.), and *Bender v. Fribourg,* No. H-87-195 (S.D. Tex.), contain claims by certain customer parties against Arthur Andersen & Co. ("Andersen"). Andersen has moved for summary judgment on all claims against it.

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[7] The court did not consider arguments contained in the customers' reply that were not contained in their initial brief.

A. Procedural Issues

On June 8, 1989, a status hearing was set for June 15, 1989 to determine page limits for briefs in support of dispositive motions. Andersen's counsel was present on June 15, but did not request an oversized brief. An order dated June 16 set page limits. Andersen was "limited to *one* 15-page brief and *one* 10-page reply." (Emphasis in original). Ignoring this order, Andersen filed two briefs. On July 7, those briefs were stricken and Andersen was permitted to file one 25-page brief. Andersen subsequently filed a 25-page brief containing a significant amount of single-spaced text and footnotes. Andersen also filed a "statement of material facts as to which there is no issue" (apparently pertaining only to the merits of various claims) and an "appendix" containing "uncontestable material facts" (pertaining only to the statute of limitations issue). Supporting exhibits were attached to the appendix even though the court had requested that the exhibits not be filed with the motions. The statement of material facts contains numbered paragraphs as required by Local Rule 12(*l*), but makes reference to no affidavits or other materials. The statement of uncontestable material facts, however, is narrative in form and does not contain numbered paragraphs. It is also argumentative in form which is contrary to the spirit of Local Rule 12(1) and violates the page limits on briefing in that the principal brief already reached the 25-page limit. Such flaunting of this court's rules and orders is certainly not condoned. Moreover, Rule 12(*l*) provides that a violation of it can be a basis for denying summary judgment. To the extent adequate facts and legal arguments are provided, however, the motion for summary judgment will be considered.

Andersen's arguments as to the merits of the claims against it largely consist of briefly reciting that *none* of the elements can be proven. Thus, the statement of material facts consists entirely of negative statements, mostly stated as legal conclusions not factual statements. For example,

¶ 1 is: "Andersen was not in privity of contract or in any relation substantially equivalent to privity of contract with any plaintiff; nor did Andersen have any relationship of trust and confidence with any plaintiff; nor was Andersen required to report to any plaintiff pursuant to Rule 1.16 issued under the Commodity Exchange Act." In taking this approach, Andersen relies on *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), which holds that the party moving for summary judgment need not provide affidavits or other evidence showing the nonexistence of essential elements and that the party with the burden of proof is the one obliged to show evidence of the essential elements. *Celotex*, however, should not be read to relieve the moving party from making arguments or placing its motion in a factual context. Failure to make an argument is, alone, an adequate basis for denying a motion. *See Gold v. Wolpert*, 876 F.2d 1327, 1333 (7th Cir.1989); *Mid-State Fertilizer*, 693 F.Supp. at 669 n. 2. Additionally, as a prudential matter, a court should not be required to deal with such an unfocused motion. *Cf. Max M. v. New Trier High School District No. 203*, 859 F.2d 1297, 1300 (7th Cir. 1988). Moreover, as to some, if not all, counts, it was possibly frivolous for Andersen to claim there was no proof as to *every* element of the count. The customers who had to respond on every element and who had to respond to such an unfocused motion had an unnecessary burden placed on them.

To the extent there are discernible arguments adequately supported by law and fact, Andersen's motion will be considered.[8] Also, since conceded by the customers, the RICO and common law fraud claims are dismissed.

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[8] Except to the extent the statute of limitations argument applies to these claims, the motion for summary judgment is not considered as to the following claims because no adequate argument is made: (a) Commodity Exchange Act; (b) tortious interference with contractual relationships; (c) inducement of breach of fiduciary duty; (d) civil conspiracy; (e) negligence; (f) negligent mis-

B. Statute of Limitations

The parties agree that a two-year limitations period applies to all claims except the Texas Securities Act claim. The parties also agree that the issue in the present case is whether the customers discovered or, in the exercise of reasonable diligence, should have discovered Andersen's alleged wrongdoing. *See Coastal Distributing Co. v. NGK Spark Plug Co.*, 779 F.2d 1033, 1037 (5th Cir.1986); *McCarthy v. Paine Webber, Inc.*, 618 F.Supp. 933, 937 (N.D.Ill.1985).

Andersen's recitation of "uncontestable material facts" recites information regarding Conti's alleged wrongdoing. There is little mention of any knowledge of Andersen's alleged wrongdoing. All that Andersen points to regarding itself is that customers knew Andersen examined Conti. Andersen points to no facts indicating that the customers should have suspected Andersen was involved in any of the alleged wrongdoing. The customers present evidence that discovery in the case against Conti was begun in a timely and diligent manner and that the customers added Andersen as a defendant after they obtained sufficient discovery to bring claims against Andersen that they knew had factual support. Whether the customers diligently pursued an investigation of Andersen's role and when they had sufficient facts to begin the running of the statute of limitations are fact questions that remain for trial. No counts are dismissed for failure to bring suit against Andersen within the statute of limitations.

C. Damages

As with the Conti parties, this court dismissed all the customers' claims against Andersen that were based on bad trades. *See* Order dated September 11, 1989. Certain customer parties' claims for damages are limited

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representation; (g) aiding and abetting; and (h) Texas Securities Act. For purposes of consistency, however, the court will apply legal rulings reached in other aspects of this case to these claims.

in the same manner as the claims against Conti were limited. *See* § II(B) *supra*.

D. Rule 10b-5

Andersen argues the customers' claims under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 are inadequate because (1) Andersen had no duty to disclose negative information about Conti to the customers; (2) the customers were not purchasers of securities; and (3) Andersen made no material false representations or omissions to the customers that were relied on by the customers.

The Seventh Circuit has held that § 10(b) and Rule 10b-5 themselves do not impose a duty to disclose upon accountants. *Latigo Ventures v. Laventhol & Horwath*, 876 F.2d 1322, 1327 (7th Cir.1989); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 496-97 (7th Cir.1986). *See also Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1126 (5th Cir.1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 3242, 106 L.Ed.2d 589 (1989) (following *Barker*). Any duty to disclose that is the basis of a Rule 10b-5 claim must exist outside the securities laws. *Barker*, 797 F.2d at 496. The Seventh Circuit has held that, under the common law of Illinois, accountants have no duty to "blow the whistle" on their clients. *Latigo*, 876 F.2d at 1327.

Since the parties make no argument as to what state's law applies in determining Andersen's common law duty, it is assumed Texas law applies since the two cases containing claims against Andersen are from the Southern District of Texas. The customers point to *Blue Bell v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408 (Tex. Ct.App.1986), as establishing a duty for Andersen. That case, however, only concerns to what extent an accountant can be liable to third parties who rely on accounting reports containing false information. *Blue Bell* does not hold that accountants have a duty to blow the whistle on their clients. Since the customers cite no Texas case

regarding the duty of an accountant to blow the whistle, it is assumed Texas law is the same as Illinois law and no such duty exists.

The customers also argue that Andersen had a duty to disclose the problems found because they were obliged to correct their previous audit report. On June 10, 1982, Andersen issued a report as to the fiscal year ending March 31, 1982 in which it was reported no "material inadequacies" were found. There is evidence that further investigation produced contrary information and the customers argue Andersen had a duty to correct the earlier report. Whether such a duty was created need not be decided. Paragraphs 158-69 of the customers' statement of additional facts sets forth the information the customers received from persons at Andersen regarding Conti. No evidence is presented by the customers to show that they examined, relied upon, or were misled by any 1982 or 1983 reports of Andersen. Since the customers were not misinformed by the 1982 or 1983 reports, Andersen had no duty to the customers to correct any misinformation in the reports. Even if it had a duty, the customers cannot show they relied on or were misled by any misinformation. Therefore, they can have no Rule 10b-5 claim based on the alleged misinformation. *Latigo*, 876 F.2d at 1325-26.

The customers also point to another source of the duty. Since Conti was a futures commission merchant, Andersen was obliged under CFTC regulations to report to Conti any "material inadequacies" found and to promptly forward such information directly to the CFTC if Conti did not. *See* 17 C.F.R. § 1.16(e)(2) (1983). This regulation, it is contended, imposed upon Andersen a duty to blow the whistle on Conti. The customers, however, present no evidence that they examined, relied upon, or were misled by the Forms 1-FR filed with the CFTC nor any other information filed with or disseminated by the CFTC. *See Latigo*, 876 F.2d at 1325-26. Perhaps the contention of the customers is that proper reporting to the CFTC would have resulted in a CFTC enforcement ac-

tion protecting their interests. There are two problems with such an argument. One is that the customers do not point to evidence supporting such a contention. The other is that such an approach does not involve disclosure or nondisclosure to the customers. *See Schlifke v. Seafirst Corp.*, 866 F.2d 935, 945-46 (7th Cir.1989).

The Exchange Act and Rule 10b-5 claims of the customers against Andersen will be dismissed. It is noted that claims that Andersen aided and abetted Conti's alleged Rule 10b-5 claims are distinct claims, the dismissal of which is not considered.

E. Other Claims

As set forth in § III(A) *supra*, no other argument of Andersen merits consideration. However, the effect on the other claims of the issues otherwise considered regarding Andersen or other parties will not be ignored where the result is obvious. The customers' argument regarding Rule 10b-5 incorporated their argument that a common law duty existed that was a basis for their negligence claims. Since those arguments did not prevail as regards Rule 10b-5, the negligence claims must also fail, as well as the gross negligence and negligent misrepresentation claims. No other claims are dismissed.

IV. CUSTOMERS AND UNITED STATES (TAX CASES)

The tax cases are claims for refunds by the Browns, Hemmings, and Benders (the "taxpayers").[9] The Browns and Hemmings claim refunds for 1984 and the Benders for 1981. The government disallowed certain claimed losses and deductions which the taxpayers appealed to the United States Tax Court. The taxpayers then agreed to drop the Tax Court cases and instead pay part of the taxes and file claims for refunds. After the claims for

[9] The Landauer case is being settled and therefore is not considered. *See* note 1 *supra*.

refund were administratively denied, they timely brought suit in district court. The government moves for summary judgment raising the following grounds: (a) the claims for refund are inadequate; (b) the taxpayers raise issues in their court suits that were not raised in the claims for refund; (c) the taxpayers are not permitted to plead in the alternative; (d) the taxpayers have not shown any legitimate trades supporting any losses or deductions; and (e) any losses sustained by the taxpayers are not yet realized.

As regards their claims against Conti and other parties, the taxpayers take the position that the trades were all "bad." As regards the tax suits, they must take the position that they were pursuing a legitimate business or making legitimate investments and therefore must contend the trades were "good." The government argues the taxpayers cannot pursue these two inconsistent positions. That issue, however, need not be decided. Even if the taxpayers can plead in the alternative, in response to a motion for summary judgment they must present evidence to support each alternative pursued. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The taxpayers present insufficient evidence to support that they have any legitimate losses or deductions. The only thing that can even be construed as trying to make such a showing are their references to Conti pleadings and the taxpayers' claims for refund. *See* Taxpayers' Response to Government's Statement of Undisputed Facts ¶¶ 36, 47-49.

A party cannot respond to a motion for summary judgment simply by citing its own pleadings. Fed.R.Civ.P. 56(e); *Petru v. City of Berwyn*, 872 F.2d 1359, 1362 (7th Cir.1989); *Instituto National De Comercializacion Agricola v. Continental Illinois National Bank & Trust Co.*, 858 F.2d 1264, 1271 (7th Cir. 1988). As for the Conti pleadings, they may be admissible against the Conti parties as admissions by a party-opponent, but they are not admissible against the government under that excep-

tion. *See* Fed.R.Evid. 801(d)(2). Since the allegations of the complaint are not based on personal knowledge, they cannot be used as evidence in opposition to a motion for summary judgment. *See* Fed.R.Civ.P. 56(e); Fed.R. Evid. 602; *Davis v. City of Chicago*, 841 F.2d 186, 189 (7th Cir.1988). Even if Conti's pleadings could be considered, they would be insufficient. First, they contain nothing concerning the Benders. They also contain nothing specifying losses or interest expenses incurred in 1981 or 1984, the only years involved in the refund suits. Further, while losses are referred to, there are no facts alleged to show the trading was profit-motivated. The pleadings cited are lacking in the specificity required in response to a motion for summary judgment. *See* Fed. R.Civ.P. 56(e); *Davis*, 841 F.2d at 189; *Congregation of the Passion v. Kidder Peabody & Co.*, 800 F.2d 177, 182-83 (7th Cir.1986).

The taxpayers also present the Conti parties' response to expert witness interrogatories. The expert's statement must also contain specific facts for it to create a factual dispute preventing summary judgment. *See Mid-State Fertilizer*, 877 F.2d at 1339. Again, there is no mention of the Benders or 1981 losses or interest expenses. There is a summary of account balances as of October 31, 1984, but nothing to show balances at the beginning of 1984 or to identify any balances to specific customers. A $27,000,000 loss is referred to as occurring in April and May 1984, as well as a net loss of $50,000,000 for calendar year 1984, but that is a total for all customers and other parts of the answer state the Brown and Hemmings group was allocated profitable trades by David Ragan. It is stated that the Brown and Hemmings group still had a substantial deficit in their accounts, but when the losses occurred is not specified and what losses the particular members of the group had is not specified. There is also no discussion of whether Brown and Hemmings were engaged in legitimate profit-motivated trades. The response to expert interrogatories does not

contain specific facts necessary to defeat summary judgment.

Since the taxpayers have failed to show they are entitled to any refunds on their claims against the government, the government is entitled to summary judgment dismissing the claims against it.

V. CONTI & CUSTOMERS v. PBT & LUIKART

A. Background

Both Conti and certain customer parties (the "nonmovants") have brought suit against PBT. Conti also brought suit against PBT's former vice president, John Luikart. PBT and Luikart (the "movants") moved for summary judgment on all claims against them. The movants concede that they made prearranged trades with David Ragan. The prearranged trades were done in pairs and resulted in essentially equal gains and losses for both PBT and Conti except that PBT always received a slightly larger gain generally equal to about 1/64 of one percent of the par value of one of the securities. This gain for PBT was in essence a commission charged for engaging in the trade. David Ragan allocated the gains and losses to various customers. PBT denies it knew the trades were for customers. The customers, however, point to testimony of PBT's president and David Ragan indicating PBT had such knowledge. Luikart also denied such knowledge, but it can be inferred that he had knowledge and, on the motion for summary judgment, this factual dispute must be resolved in the customers' favor.

The nonmovants complain that the movants have failed to provide a statement of uncontested facts as required by Local Rule 12(*l*). Rule 12(*l*) has not been complied with, but a narrative statement of facts has been provided along with citations to the record. Although this practice is not condoned, the court will nevertheless consider the movant's motions. The more difficult problem with PBT's brief is not the lack of clarity in the presentation of facts,

but the lack of clarity in argument. Besides lacking clarity, PBT's motion purports to be one directed at all claims against it yet the only claim addressed is the Rule 10b-5 claim made in each of the relevant cases.[10] It will only be considered whether the nonmovants' Rule 10b-5 claims should be dismissed. Luikart also raises the argument, apparently applicable to all claims against him, that he cannot be personally liable. The evidence, however, is to the contrary. PBT's failure to be clear in arguing that all claims against it should be dismissed imposed upon the nonmovants the unnecessary burden of responding as to all counts, but the nonmovants concentrated more on the Rule 10b-5 claims.

B. Conti

Movants argue they had no duty to disclose information. That argument, however, does not apply to Conti with whom PBT had a direct relationship and therefore owed a duty. Moreover, PBT issued statements implicitly misrepresenting that the trades with Conti were valid transactions rather than prearranged, nonmarket trades. Also, PBT covered up the fact it was indirectly charging Conti commissions. None of Conti's claims against PBT are dismissed.

C. Customers

Unlike Conti, the customers had no direct relationship with PBT. PBT owed them no duty to disclose. *See Congregation of the Passion,* 800 F.2d at 183. The customers point to the same misrepresentations that Conti points to. The customers, however, point to no evidence that they knew of, relied upon, or were mislead by the misrepresentations. Therefore, they can have no Rule

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[10] It is also noted that the movants fail to identify the particular counts of complaints that they seek to have dismissed. *See* Order dated May 16, 1989.

10b-5 claim against the movants. *See* § III(D) *supra.* The customers' Rule 10b-5 aiding and abetting claim, however, can continue. Scienter can be inferred from evidence of PBT's knowledge the trades were for customers and from the obviously questionable nature of the trades. Furthermore, this case is distinguishable from *Barker,* 797 F.2d at 497, because here PBT profited from each trade David Ragan made on behalf of the customers.

As regards all the claims of the customers against PBT, the customers' damages are limited in the manner described in § II(B) *supra.*

VI. CUSTOMERS AND MERRILL LYNCH

A. Background

After David Ragan left Conti and CAH shut down, the Brown and Hemmings parties transferred their CAH accounts to Merrill Lynch where David Ragan had located. In *Hemmings v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. H-86-2280 (S.D.Tex.), these customers claim David Ragan thereafter continued to engage in improprieties in handling their accounts. Prior to the transfer, Conti closed the customers' cash positions while leaving open the corresponding arbitrage futures positions. The customers complain Merrill Lynch failed to inform them the cash positions had been closed. Merrill Lynch moves to dismiss all the claims on the ground the customers cannot show Merrill Lynch caused any damages and also because the customers did not identify bad trades. Alternatively, Merrill Lynch argues two claims should be dismissed on their merits. The customers concede the CEA § 4d(2) claim contained in Count II should be dismissed.

B. Damages

Merrill Lynch contends the evidence shows that any damages the customers sustained was caused when the

customers' accounts were at Conti. The customers, however, present evidence that they had no knowledge certain positions were closed and that Merrill Lynch failed to inform them. At oral argument on the summary judgment motions, Merrill Lynch conceded the customers' accounts decreased approximately $2,000,000 while at Merrill Lynch. The customers present evidence that knowledge of the closing of the cash positions would have enabled them to replace those positions and thereby avoid losses. The customers, therefore, have presented evidence of causation as to at least some of their claimed damages. As regards the failure to identify bad trades, the customers' damages claims are limited to the extent described in § II(B) *supra.*

C. Texas Deceptive Trade Practices Act

Merrill Lynch argues the claims under the Texas Deceptive Trades Practices Act ("DTPA"), Tex.Bus. & Comm.Code Ann. § 17.01 *et seq.*, should be dismissed because these customers are business consumers with assets of 25 million dollars or more. *See id.* § 17.45(4). Unlike the Conti parties, *see* § II(Q) *supra,* any claim against Merrill Lynch arose after § 17.45(4) and (10) were amended.

Under the DTPA:

> "Business consumer" means an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state.

Id. § 17.45(10). The DTPA also provides:

> "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25

> million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

Id. § 17.45(4).

Merrill Lynch has presented evidence showing that Brown and Hemmings each own assets in excess of 25 million dollars. No evidence to the contrary has been presented by the customers. It is also uncontroverted that they were in a trade or business. Merrill Lynch presents no evidence as to the assets of the partnerships, H & B and B & H, that also bring the DTPA claims against Merrill Lynch. The customers present Hemmings's affidavit which states, "The total combined assets devoted by Claude Brown and me to our trading business were approximately $15 million dollar. We did not devote our entire net worth to this business." Hemmings does not make clear what exactly he means by this statement. In any event, no evidence is presented as to what the assets of H & B and B & H were. Once Merrill Lynch raised the issue, as it has, the burden was on the customers to show the partnerships had assets of less than 25 million dollars. *Eckman v. Centennial Savings Bank,* 32 Tex.S.Ct.J. 46 (1988). Since plaintiffs have failed to satisfy that burden, they have not proved an essential element of their claim.[11]

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[11] If it had been shown that the partnerships themselves had assets of less than $25 million dollars, their DTPA claims would not have been dismissed. Merrill Lynch argues all the assets of the partners should be considered the assets of the partnership. It, however, cites no authority in support of that argument which this court would reject; a partnership can hold assets distinct from what each partner holds. Merrill Lynch also argues the partnerships are owned by entities with assets over 25 million dollars. Section 17.45(4) only refers to ownership by "a *corporation or entity* with assets of $25 million or more." An individual, such as Brown or Hemmings, is not an "entity." The partnerships are not owned by any entity. Last, Merrill Lynch argues there was no purchase of a good or service. Although the securities purchased are not goods, the customers purchased the

The DTPA claims of Hemmings and Brown are dismissed because the uncontroverted evidence shows that they have assets of $25 million dollars or more. The DTPA claims of B & H & H & B are dismissed because they have failed to show they are nonbusiness consumers or business consumers with assets of less than 25 million dollars. Count VII of the complaint against Merrill Lynch is dismissed.

VII. CONTI AND RELIANCE

Based on liabilities it has paid to customers other than those involved in this litigation, Conti seeks to collect on a fidelity bond it had with Reliance. *ContiCommodity Services, Inc. v. Reliance Insurance Co.*, No. 86 C 4404 (N.D.Ill.). The liability to the customers is based on David Ragan's purported dishonesty. The bond was ordered in February or March 1984.[12] The parties agree, at least for purposes of this motion, that the effective date of the bond was May 7, 1984. Reliance moves for summary judgment on the ground Conti discovered David Ragan's dishonesty no later than May 1 or 2, 1984 and therefore the bond does not cover any claims based on David Ragan's dishonesty.

Reliance points to two provisions of the bond as precluding any liability on its part. One is the "discovery clause." The bond provided that Reliance would indem-

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services of investment advice which are covered by the DTPA. *Nottingham v. General American Communications Corp.*, 811 F.2d 873, 878 (5th Cir.), *cert. denied*, 484 U.S. 854, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987); *FDIC v. Munn*, 804 F.2d 860, 865 (5th Cir. 1986).

[12] The statements of fact submitted by the parties do not refer to this date and the court has not combed the record to find evidence of this date. This date, however, is assumed to be true because counsel for Reliance made such a concession at oral argument on the summary judgment motion. This concession is noted because Reliance's brief makes it appear the decision to order the bond was made close to or after May 1, 1984.

nify Conti and hold Conti harmless for a "loss sustained by [Conti] at any time but discovered during the Bond Period." A rider (SR 6091) adds the following definition of discovery.

> Discovery occurs when the insured becomes aware of facts which would cause a reasonable person to assume that a loss covered by the bond has been or will be incurred even though the exact amount or details of loss may not be then known. Notice to the insured of an actual or potential claim by a third party which alleges that the insured is liable under circumstances, which, if true, would create a loss under this bond constitutes such discovery.

Reliance claims the undisputed evidence shows the losses resulting from David Ragan's conduct were discovered no later than May 1 or 2, 1984. The provision relied upon is the "cancellation clause." That clause (§ 11 of the bond) provides:

> This bond shall be deemed terminated or canceled as to any Employee—(a) as soon as the Insured shall learn of any dishonest or fraudulent act on the part of such Employee, ...

Reliance claims the undisputed evidence shows Conti learned of such acts on the part of David Ragan no later than May 1 or 2, 1984.

Reliance relies heavily on the following deposition testimony of Herbert Evers, Conti's president as of May 1984.

> Q. At what point did you form the opinion that [David] Ragan was dishonest?
>
> A. At that time.
>
> Q. On May 1 or May 2 [1984]?
>
> A. Yes. I considered him difficult to deal with before that, but not dishonest.

Conti concedes that as of May 1 and 2, on which dates Evers met with David Ragan, Evers had a "suspicion"

David Ragan engaged in speculative trading for speculative accounts at a level not justified by the available equity in the accounts and that David Ragan was covering up. Conti also points to testimony of Evers in which he clarified that he believed as of May 1 and 2 that David Ragan was dishonest in answering Evers's questions, but that he did not yet believe David Ragan had engaged in fraudulent conduct with customers. It was after the May 1 and 2 meeting that Conti began investigating David Ragan's conduct. Reliance also points to evidence that David Ragan informed Evers there were substantial losses in customer accounts and that his estimates of the losses varied. The evidence also shows David Ragan informed Evers the customers would pay their deficits.

On this motion for summary judgment, all reasonable inferences must be drawn, and all disputes resolved, in favor of Conti. Reliance is only entitled to summary judgment if the evidence leads to only one conclusion, that Conti discovered David Ragan's wrongdoing before May 7. The evidence is not conclusive as to the "discovery clause." To show discovery, the evidence must be such that a reasonable person would assume a loss covered by the bond *has been* or *will be incurred*. While the evidence is certainly enough to form a suspicion, as Evers admitted, it was not necessarily enough to assume the customers actually had been defrauded. Under the language of the bond, there is a difference between suspicion and reasonably assuming the wrongdoing had been committed. Whether Conti had enough information to make the reasonable assumption is a question that will be left for the jury. The cases cited by Reliance, *First Security Savings v. Kansas Bankers Surety Co.*, 849 F.2d 345 (8th Cir.1988), and *Royal Trust Bank, N.A. v. National Union Fire Insurance Co. of Pittsburgh*, 788 F.2d 719 (11th Cir.1986), do not require the opposite result. Both of those cases, like the present case, are decided on their own particular facts.

As regards the cancellation clause, Reliance argues Evers's testimony conclusively shows Conti "learned" of David Ragan's dishonesty by May 1 or 2 and therefore the bond never applied to David Ragan's conduct. Reliance, though, ignores the language in the rider (SR 6035a) which defines dishonest or fraudulent acts. That rider amends the principal form to define covered losses as follows:

> (A) Loss resulting from one or more dishonest or fraudulent acts of an Employee, committed anywhere and whether committed alone or in collusion with others, including loss of Property resulting from such acts of an Employee, which Property is held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the insured is liable therefor.
>
> Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent:
>
> (a) to cause the Insured to sustain such loss; and
>
> (b) to obtain financial benefit for the Employee or for any other person or organization intended by the Employee to receive such benefit, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.

This amendment makes clear that "dishonest or fraudulent act" as used in the cancellation clause means a dishonest or fraudulent act causing a covered loss, not just any dishonest act. Contrary to Reliance's argument, there is nothing in the rider limiting the definition of dishonest or fraudulent acts to covered losses under § (A); instead the language of the rider expressly states "as used in this

Insuring Agreement." Evers's belief that David Ragan was dishonest with him did not invoke the cancellation clause; only learning of a dishonest act causing a covered loss could do that. As already discussed, there is a factual dispute as to whether such was learned or discovered on May 1 and 2.

Reliance's motion for summary judgment is denied.

VIII. CUSTOMERS AND DAVID RAGAN

Certain customer parties have moved for summary judgment on some of their claims against David Ragan in *Hemmings v. Ragan*, No. H-87-1333 (S.D.Tex.). They claim there is incontrovertible evidence that David Ragan used block trades contrary to representations he would do individualized trading. They also claim the evidence conclusively shows allocations of the trades to particular customers were untimely and done in a discriminatory manner. The customers claim they are entitled to summary judgment on (a) breach of fiduciary duty claims in violation of the common law and CEA; (b) common law fraud claims; (c) negligence claims; and (d) gross negligence claims. David Ragan opposes summary judgment on all counts. David Ragan admits trades were done in blocks, but argues that conduct does not constitute a basis for any cause of action. David Ragan claims evidence shows trades were timely and nondiscriminatorily allocated and that any damage to the customers was caused by Conti not him. As with the other cases, certain customer parties' claims for damages are limited in the manner described in § II(B) *supra*.

David Ragan's evidence supporting his claim that both futures and cash trades were timely and nondiscriminatorily allocated has been examined. Factual disputes must be resolved in favor of David Ragan, the nonmovant. Therefore, the only issue that need be addressed is whether the failure to inform the customers that trades were made in blocks can form the basis of granting summary judgment on any of the customers' claims.

The customers have not pointed to any evidence that use of block trades was a material fact that would have affected their investment decisions. They also fail to point out how block trades harmed them. A particular type of trade can be part of different types of trading programs; use of block trades does not automatically mean that an individual's requested or particularized program is not being followed. In any event, since reliance has not been shown, the customers are not entitled to summary judgment on the common law or CEA § 4b fraud claims. *See Horn v. Ray E. Friedman & Co.*, 776 F.2d 777, 780 (8th Cir.1985); *First Naitonal Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1340 (6th Cir.1987); *Herman v. T & S Commodities, Inc.*, 592 F.Supp. 1406, 1416 (S.D.N.Y. 1984). Reliance is also an element of negligent misrepresentation. *See Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 197 Mont. 1, 640 P.2d 453, 458-59 (1982) (quoting Restatement (Second) of Torts § 552 (1977)). Whether the customers relied on a belief that there would be no block trades is also part of the causation issue on the common law breach of fiduciary duty claim. *See id.* 640 P.2d at 457.

Since the failure to show reliance precludes summary judgment on the claims related to block trading, it is unnecessary to determine if the use of block trades is material as a matter of law nor whether a CEA claim can be brought based on block trading of nonregulated cash trades related to regulated futures trades. Certain customer parties' motions for summary judgment against David Ragan are denied in their entirety.

IX. CONTI PARTIES AND DAVID RAGAN

In *ContiCommodity Services, Inc. v. Ragan*, No. H-84-4652 (S.D.Tex.), Conti and Continental brought suit against David Ragan and others. David Ragan counterclaimed against Conti and Continental. Counterdefendants have moved to dismiss all the counts of David Ragan's countercomplaint. Although this case was filed in Texas,

the parties generally cite only Illinois law. Illinois law will be applied to David Ragan's counterclaims except where a party has cited Texas law. To the extent any claims lack evidence as to Continental's direct involvement, Continental can still be held liable for Conti's actions on other grounds. *See* § II(C) *supra*. None of David Ragan's damages claims are based on bad trades; no claims are dismissed for failure to identify bad trades.

A. Breach of Contract

In Count I of the countercomplaint, David Ragan claims Conti breached oral promises to provide adequate recordkeeping services, staff, data processing equipment, and technical expertise to insure adequate, timely, and accurate posting of trades to customer accounts. In response to the summary judgment motion, he refers only to the lack of adequate computer equipment. David Ragan claims he was promised the computer equipment both before he was hired and after he was hired. Counterdefendants argue the written contract between Conti and David Ragan superseded any prior oral promise and that the written contract requires that subsequent amendments be in writing.

David Ragan presents adequate evidence of a prior oral agreement. *See* David Ragan Affidavit ¶ 12. He argues the written contract did not supersede this promise because the written contract is not a full and complete contract, but only a contract as to compensation. No authority is cited in support of this argument. This argument is misplaced for two reasons. First, the written contract concerns matters in addition to compensation. Second, the contract expressly states:

> The understanding which is set out in detail below supersedes *any* prior agreements or communications which have taken place between us. This agreement also is intended to supersede *any* oral understanding that has been the subject of our frequent discussions.

(Emphasis added). The contract clearly superseded the prior oral agreement and David Ragan presents no grounds for ignoring that provision.

As regards the purported subsequent oral agreement, David Ragan correctly argues that such agreements are enforceable despite the contract's express provision that it can only be modified in writing. *Park v. Dealers Transit, Inc.*, 596 F.2d 203, 205 (7th Cir.1979); *Estate of Kern v. Handelsman*, 115 Ill.App.3d 789, 71 Ill.Dec. 407, 411, 450 N.E.2d 1286, 1290 (1983). The documents purportedly showing the existence of the subsequent agreement, *see* David Ragan's response to Conti's & Continental's Statement of Uncontested Facts ¶ 279,[13] have been examined and no evidence of a clear and definite agreement has been found. Count I of the counter-complaint will be dismissed.

B. Interference with Employment Relations

David Ragan has presented evidence that, after he left Conti to work at Merrill Lynch, Conti and Continental informed Merrill Lynch employees that David Ragan had been involved in criminal conduct with customer accounts. Counterdefendants do not claim the undisputed facts show David Ragan was engaged in criminal conduct. There is evidence from which it can be inferred that counter-defendants intended to induce David Ragan's firing. David Ragan has also presented evidence to support the claim that the information provided by counterdefendants caused David Ragan's dismissal from Merrill Lynch. David Ragan, however, has not presented specific facts showing counterdefendants caused the loss of any other employment. The citations contained in paragraphs 24

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[13] David Ragan cites to pages 558-87 of his deposition. Those pages, however, were not included in the exhibits submitted by David Ragan. The pages, though, were found in the computer diskettes submitted by the certain customer parties. As regards a number of other claims as well, David Ragan's cited material could only be found on the computer diskettes.

and 25 of David Ragan's statement of additional facts ("SOF") have been examined. No loss of a job opportunity caused by counterdefendants is shown. Moreover, David Ragan's deposition contains only nonadmissible hearsay testimony as to any false information counterdefendants passed on to persons other than Merrill Lynch employees.

Count II of the countercomplaint is dismissed to the extent claims are made based on any employment relationship other than the one with Merrill Lynch.

C. Interference with Business Relations with Customers

David Ragan points only to his own testimony to support his claim that counterdefendants interfered with his relationship with customers. *See* SOF ¶¶ 22-24. There is no testimony that any customer told David Ragan he or she stopped using David Ragan because of any comments heard. Even if there were, David Ragan presents no nonhearsay testimony showing that counterdefendants provided any false information to the customers. Count III of the countercomplaint will be dismissed.

D. Fraud and Conspiracy

David Ragan does not point to any evidence that counterdefendants made any representations contrary to any decision that had been made. Since no false representations are shown, Count IV of the countercomplaint will be dismissed.

E. Slander and Libel

Counterdefendants contend David Ragan cannot show any defamatory statements. The record is to the contrary. *See* § IX(B) *supra.* Count V of the countercomplaint will not be dismissed; however, whether all of the elements of a valid claim can be shown is not clear on this record.

F. Indemnity and Contribution

David Ragan claims counterdefendants should indemnify him for any damages he may owe to the customers. This claim, however, is premature since David Ragan has not yet been found liable in any action. *Pate v. Tellepsen Construction Co.*, 596 S.W.2d 548, 552 (Tex. Civ.App. 1980); *Forty-Eight Insulations, Inc. v. Johns-Manville Products Corp.*, 472 F.Supp. 385, 393 (N.D.Ill. 1979). *Moricoli v. P & S Management Co.*, 104 Ill. App.3d 234, 60 Ill.Dec. 4, 432 N.E.2d 903 (1982), is inapposite since in that case the indemnitor was already a party to the suit. Moreover, to the extent Texas and Illinois law are inconsistent, Texas law controls in this case. Count VI of the countercomplaint will be dismissed.

G. Invasion of Privacy

David Ragan has presented sufficient circumstantial evidence to show that counterdefendants took possession of his personal bank records. These documents were used in a suit counterdefendants brought against David Ragan in Kentucky. Counterdefendants, citing *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 647 (7th Cir.1983), argue this makes the claim one for malicious prosecution. David Ragan does not point to use or publication of these documents other than in the Kentucky proceeding. David Ragan has not shown that the alleged intrusion, not the lawsuit itself, caused him any anguish or suffering. *See Mucklow v. John Marshall Law School*, 176 Ill.App.3d 886, 126 Ill.Dec. 314, 319, 531 N.E.2d 941, 946 (1988) (quoting *Melvin v. Burling*, 141 Ill. App.3d 786, 95 Ill.Dec. 919, 921-22, 490 N.E.2d 1011, 1013-14 (1986)). Count VII of the countercomplaint will be dismissed.

H. Negligent Misrepresentation

David Ragan argues that counterdefendants were in the business of providing information to regulatory bodies

such as the CFTC, Chicago Board of Trade, and Internal Revenue Service and that he can bring suit for negligent misrepresentations to such agencies that caused injury to him. No authority is cited in support of this argument. The case law cited by counterdefendants is to the contrary, holding that the misrepresentation must be information the plaintiff, not a third party, is relying on. *See Zahorik v. Smith Barney, Harris Upham & Co.*, 664 F.Supp. 309, 313 (N.D. Ill.1987). *See also* Restatement (Second) of Torts § 552 (1977). Count VIII of the countercomplaint will be dismissed.

I. Breach of Fiduciary Duty

David Ragan has cited no authority to support his claim Conti owed him a fiduciary duty. Count IX of the countercomplaint will be dismissed.

X. CONCLUSION

As described above and as set forth in the orders for each particular case, the motions for summary judgment in this multidistrict litigation are granted in part and denied in part. Any motion for reconsideration [14] of the rulings on the summary judgment motions *must* be filed by January 25, 1990.[15] The supporting brief *must* also be

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[14] This is not to be construed as an invitation to file motions for reconsideration as a matter of course. Any reconsideration motion filed should only be based on what the party perceives to be a clear error of fact or law or a misapplication of today's ruling to particular counts of a complaint.

[15] It is recognized that, in most if not all cases, Fed.R.Civ.P 59(e), the time requirements of which are measured from the date of entry of a judgment, will provide a greater length of time for seeking reconsideration. Even if not untimely under Rule 59(e), any motion for reconsideration filed after January 25, 1990 will be deemed waived for failing to meet the schedule set by the court.

filed by that date or the motion will be denied.[16] No supporting brief will exceed 10 pages except that certain customer parties will be allowed up to 15 pages and the Conti parties up to 20 pages. Unless ordered by the court, no response to any motion for reconsideration shall be filed. Neither shall any party file a motion for leave to file a response. A status hearing is set for February 21, 1990 at 1:30 p.m. The parties should be prepared at that time to discuss (a) pending motions for reconsideration; (b) any matters remaining to be resolved by this court; and (c) the preparation of final pretrial orders.

IT IS THEREFORE ORDERED that the "Summary Judgment Opinion" is entered in the record of MDL No. 644. Any motions for reconsideration of this opinion and related orders, with supporting briefs, are to be filed by January 25, 1990. No brief may exceed 10 pages except that certain customer parties are allowed 15 pages and the Conti parties 20 pages. No response to any motion for reconsideration is to be filed absent further order of this court. A status hearing is set for February 21, 1990 at 1:30 p.m.

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[16] The motion and supporting brief should be filed by the given date. They should not be noticed to be presented on a particular date; they should simply be filed.

ORDER

Arthur Andersen and certain customer parties have moved for reconsideration of certain aspects of this court's January 11, 1990 summary judgment opinion ("SJO").

Andersen's motion is denied in its entirety. All the issues raised are already adequately addressed in the SJO.[1]

Certain customer parties claim dismissal of certain of Conti's claims were essentially conceded by Conti in that Conti provided no response to customers' arguments to dismiss those claims. Conti shall file a response, not to exceed four pages, in which it shall expressly state these issues are conceded or point to those portions of its previously filed brief where it responded to these issues.

Certain customer parties also claim the evidence previously submitted shows H & B and B & H do not have assets of $25,000,000 or more. *See* SJO at 1576-1577 & n. 11. Those documents were previously examined and found to be lacking. However, a new affidavit has been submitted in which Isaac Hemmings states, "At no time did H & B and B & H have assets totalling $25 million dollars." In the context of the affidavit, it is not clear that Hemmings has taken into consideration any possible increase in assets due to profitable trading. Hemmings's statement, though, will be taken as true unless Merrill Lynch can submit contrary financial statements or other nonrefutable evidence that either or both partnerships had $25,000,000 or more of assets at the time their claims accrued. Merrill Lynch shall file a response to this aspect of the motion for reconsideration. The response shall not exceed four pages.

The customers' arguments and cited evidence regarding the claims against Andersen were previously considered

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[1] Andersen also claims certain counts against it were purportedly dismissed even though those counts were against other parties not Andersen. The orders, however, are clear that those counts are dismissed as against the defendants named in them.

and discussed. *See* SJO at 1572-1573. That aspect of the customers' motion for reconsideration is denied.

IT IS THEREFORE ORDERED that:

(1) Arthur Andersen's motion for reconsideration of memorandum opinion and order is denied.

(2) Customer parties' motion for reconsideration of January 11, 1990 orders is denied in part and taken under advisement in part. Customers' reconsideration motion is denied as regards claims against Arthur Andersen. Conti and Merrill Lynch shall answer customers' reconsideration motion by February 14, 1990. The answers shall not exceed four pages.

ORDER

The customer parties moved for reconsideration of the summary judgment opinion ("SJO") and related orders dated January 11, 1990. That motion was denied in part and Merrill Lynch and Conti were ordered to respond to certain parts of that motion. That reconsideration motion is now granted in part and the SJO and related orders are amended.

Customers have presented evidence that H & B and B & H have assets of less than $25,000,000. Merrill Lynch does not present any contrary evidence. Merrill Lynch again argues that the assets of the partners should be considered, not just the assets of the partnerships themselves. This argument was previously rejected. *See* SJO 1576-1577. There is no longer any reason for dismissing the Texas Deceptive Trade Practices Act claims of H & B and B & H. The prior orders are amended to reinstate those claims.

Conti has conceded that certain of its claims should be dismissed. Its claims against the customers for aiding and abetting unjust enrichment, aiding and abetting tortious interference, aiding and abetting conspiracy to breach fiduciary duties, aiding and abetting conspiracy to defraud, aiding and abetting breach of contract, conspiracy to be unjustly enriched, and conspiracy to commit tortious interference are dismissed.[1] The claims against Bender for aiding and abetting David Ragan's violations of the Commodity Exchange Act are dismissed. The customer's motion for reconsideration is otherwise denied.

The charts submitted by the customers and Conti are not consistent as to the particular claims and cases the above ruling applies to. Those parties shall submit an agreed statement as to the particular counts to be dismissed, making sure to also refer to the correct case name and number.

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[1] The claims for aiding and abetting David Ragan's breach of fiduciary duty and for aiding and abetting a fraud are not dismissed.

IT IS THEREFORE ORDERED that certain customer parties' motion for reconsideration of January 11, 1990 orders is granted in part and denied in part. Certain customer parties and Conti shall submit a joint statement as to counts to be dismissed on March 2, 1990.

[Entered Jul. 16, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

~~Civil~~ Action No. H-84-4652

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,
Plaintiffs,

VS.

DAVID J. RAGAN, *et al.*,
Defendants.

ORDER

Pending before the Court is Counter-Defendants' Motion for Summary Judgment on the remaining counterclaims of David Ragan and his father Joe Ragan. The counterclaims filed by David Ragan involve statements allegedly made by Counter-Defendants to the effect that David Ragan was involved in criminal activity. David Ragan's criminal conviction eliminates any genuine issue of material fact regarding the issue of truth, and Counter-Defendants' motion should be granted as to David Ragan.

Joe Ragan's counterclaims all relate to accounts he had with Conticommodity which he asserts were improperly closed by Conti without paying to him the funds in the accounts at the time of the closing. These claims all rely on a finding that Joe Ragan's accounts had a positive balance when they were closed. Conti argues that

David Ragan's trial testimony that he managed his father's accounts and that they were "underwater" at the time they were closed entitles them to summary judgment. Joe Ragan argues that the term "underwater" does not necessarily mean that the accounts had no value and that David Ragan previously submitted an affidavit that the accounts had a value in excess of a million dollars, thus precluding summary judgment.

While the Court is well aware that David Ragan's testimony referred to the lack of value in his father's account at the time of closing, additional evidence on that issue is required before the Court can rule on the motion for summary judgment. Accordingly, each side shall present additional evidence, if any exists, regarding the use of the term "underwater" in the futures trading market and regarding the value of Joe Ragan's account at the time of its closing.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment on the Counterclaims (Entry #109) is GRANTED as to the counterclaims of David Ragan and TAKEN UNDER ADVISEMENT as to the counterclaims of Joe Ragan. The presentation of additional evidence as described above shall be submitted to the Court on or before July 30, 1993.

SIGNED this 14th day of July, 1993, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
Chief Judge

[Entered Mar. 25, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-84-4652

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,
Plaintiffs,

vs.

DAVID J. RAGAN, *et al.*,
Defendants.

ORDER

This case is before the Court on Counter-defendants' ("Conti's") Renewed Motion for Summary Judgment on the counterclaims filed by Defendant Joe Ragan. The United States Supreme Court has held that a motion for summary judgment is properly granted unless there is evidence "on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). Rule 56, no longer a disfavored procedure in federal practice, is an integral part of the Federal Rules of Civil Procedure and recognizes a party's right to demonstrate that certain claims have no factual basis and to have those unsupported claims disposed of prior to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In the case at bar, Counter-plaintiff Joe Ragan has failed to raise a

genuine issue of material fact and Counter-defendants are entitled to summary judgment.

This case was previously assigned to the docket of Judge Hart in the Northern District of Illinois for pretrial proceedings. Having been advised at a hearing by Joe Ragan's counsel that Joe Ragan's claim was that he was "owed money because we got an account statement in March and April that showed that we had a positive balance" and having noted that Joe Ragan failed to identify any specific "bad" trades on which he based his counterclaims, Judge Hart issued a written opinion in which he noted that Joe Ragan's claim is that "Conti did not distribute the entire balances remaining in [his] accounts when CAH was closed down." *In re Conticommodity Services, Inc. Securities Litigation*, 733 F. Supp. 1555, 1562 (N.D. Ill. 1990). Judge Hart also stated that "The claims of . . . Joe Ragan are not based on allegations of bad trades." *Id.* at 1564. Judge Hart also denied Conti's motion for summary judgment on Joe Ragan's conversion claim, finding that Joe Ragan claimed only that Conti converted the balances in his accounts, not that Conti improperly closed out his positions. *Id.* at 1570. Judge Hart and this Court have both noted that Joe Ragan's claims require a positive balance in the accounts at the time of closing.

Conti previously moved for summary judgment based on David Ragan's testimony at trial that Joe Ragan's account was "underwater" at the time the account was closed in May 1984. The Court held that the evidence presented by the parties raised a genuine issue of material fact regarding what David Ragan meant when he used the term "underwater" at trial. Conti then served damages interrogatories on Joe Ragan, and the responses to those interrogatories include a number of calculation methods or "projections" prepared by Ragan's expert. Each projection reflects a large deficit balance in Joe Ragan's accounts at the time of closing in May 1984. A "Projection of Profit on Securities Held Jan. 1, 1984

Until Maturity Reflecting Reinvestment in Like Securities for Period Jan. 1984-Dec. 1985" results in a positive balance beginning October 1984, the earliest that any projection shows a positive balance.

The expert evidence presented by Joe Ragan establishes clearly that his Conti accounts did not have a positive balance when they were closed and, as a result, Joe Ragan cannot establish the damages he claims. Joe Ragan attempts to avoid summary judgment by arguing that there are a number of ways to prove damages for improper liquidation. Initially, the Court notes that Joe Ragan has repeatedly maintained that his claims involve only Conti's failure to pay him the positive balance in his accounts upon closing. Joe Ragan cannot avoid summary judgment by changing, at this point in the litigation, the character of his claims. Indeed, the arguments he seeks to raise at this point are those which he, in a prior attempt to avoid summary judgment, advised Judge Hart were not applicable to his claims.

Additionally, even were this Court to accept Joe Ragan's new characterization of his claims, summary judgment for Counter-defendants would still be appropriate. A plaintiff asserting an improper liquidation claim may recover only the increase in value, if any, of the liquidated positions within a reasonable time after liquidation. *Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979). Joe Ragan's own evidence is that there was no positive balance until, at the earliest, five months after liquidation. That projection, which is based on positions held months prior to the closing instead of those in the account at the time the accounts were closed and involves "reinvestment in like securities," is so highly speculative as to be inadmissible.

The uncontroverted evidence of Joe Ragan's own expert establishes that there was a significant negative balance in Ragan's Conti accounts in May 1984 when the accounts were closed. Joe Ragan cannot be permitted to

change the characterization of his claims at this point and, were such a change permitted, the Court finds from the uncontradicted evidence that there was no positive balance within a reasonable time after liquidation. Accordingly, Joe Ragan has failed to raise a genuine issue of material fact on the issue of his damages and Counter-defendants are entitled to summary judgment on his counterclaims.

Based on the foregoing, it is hereby

ORDERED that Counter-defendants' Renewed Motion for Summary Judgment (Entry #143) is GRANTED.

IT IS FURTHER ORDERED that counsel for Plaintiffs shall advise the Court on or before April 11, 1994 whether they intend to pursue their affirmative claims to trial or whether those claims will be voluntarily dismissed.

SIGNED this 24th day of March, 1994, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
Chief Judge

[Entered Apr. 14, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-84-4652

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,
Plaintiffs,

v.

DAVID J. RAGAN and JOE O. RAGAN,
Defendants.

FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 54(b), the Order entered on July 16, 1993, granting ContiCommodity Services, Inc., and Continental Grain Company's Motion for Summary Judgment on all Remaining Counterclaims of David J. Ragan, and the Order entered on March 25, 1994, granting ContiCommodity Services, Inc., and Continental Grain Company's Renewed Motion for Summary Judgment on all Counterclaims of Joe O. Ragan, this Court has determined that there is no just reason to delay the entry of a final judgment dismissing with prejudice all of the claims of David J. Ragan and Joe O. Ragan against ContiCommodity Services, Inc., and Continental Grain Company.

It is hereby ORDERED AND ADJUDGED that all of David J. Ragan's claims against ContiCommodity

Services, Inc., and Continental Grain Company are dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that all of Joe O. Ragan's claims against ContiCommodity Services, Inc., and Continental Grain Company are dismissed with prejudice.

Judgment shall be entered upon these dismissals with prejudice, and this Judgment shall be final and appealable.

SIGNED this 8th day of April, 1994, at Houston, Texas.

/s/ Norman W. Black
NORMAN W. BLACK
Chief Judge